(24,545)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 801.

ALI GEGIOW AND SABAS ZARIKOEW, PETITIONERS,

vs.

BYRON H. UHL, AS ACTING COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 24, 1915.

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a United States Circuit Court of Appeals for the Second Circuit.

THE PEOPLE OF THE UNITED STATES ex Rel. ALI GEGIOW et al., Appellants,

vs.

BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York, Appellee.

Transcript of Record from the District Court of the United States for the Southern District of New York.

United States Circuit Court of Appeals, Second Circuit. Filed Mar. 12, 1914. William Parkin, Clerk.

1 *Writ of Habeas Corpus.*

The President of the United States of America to Hon. Byron H. Uhl, Acting Commissioner of Immigration at the Port of New York, or to any other person or persons having the custody of Ali Gegiew, Tamich Scheribow, Sabas Zarikoew, Afago Atzkapok, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozakoff, Sachid Pannesshew, Mudar Gurfow, Dyko Gazaff, Gerandika Tabuchow, Zullkarney Mukosoff, Chasir Charsinow, Ashit Guruhoff, detained aliens at Ellis Island, New York Harbor, or elsewhere, Greeting:

We command you, that you have the bodies of Ali Gegiew, Tamich Scheribow, Sabas Zarikoew, Afago Atzkapok, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozakoff, Sachid Pannesshew, Mudar Gurfow, Dyko Gazaff, Gerandika Tabuchow, Zulkarney Mukosoff, Chasir Charsinow, and Ashit Guruhoff, aliens, by you imprisoned and detained, as it is said together with the time and cause of such imprisonment and detention, by whatsoever names the said Ali Gegiew, Tamich Scheribow, Sabas Zarikoew, Afago Atzkapok, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawakozakoff, Sachid Pannesshew, Mudar Gurfow, Dyko Gazaff, Gerandika Tabuchow, Zulkarney Mukosoff, Chasir Charsinow, and Ashit Guruhoff are called or charged, before the United States District Court, for the Southern District of New York, on the 27th day of February, 1914, at 10:30 o'clock in the forenoon of that day, at Room No. 66 in the Court House of the said court, held in the United States Post Office
2 building, in the Borough of Manhattan, City of New York, to do and receive what shall then and there be considered concerning said Ali Gegiew, Tamich Scheribow, Sabas Zarikoew, Afago Atzkapok, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozakoff, Sachid Pannesshew, Mudar Gufow, Dyko Gazaff, Gerandika Tabuchow, Zulkarney Mukosoff, Chasir Charsinow and Ashit Guruhoff, and have you then there this writ.

Witness, Hon. Charles M. Hough, Judge of the United States Dis-

trict Court, for the Southern District of New York, at the United States Court House and Post Office building, in the Borough of Manhattan, City of New York, on the 20th day of February, One thousand nine hundred and fourteen.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

Writ allowed.

LEARNED HAND,
U. S. District Judge.

BARNETT & JABLOW,
Attorneys for Above Named Aliens.

Office & Post Office Address, No. 149 Broadway, Borough of Manhattan, City of New York.

(Endorsed:) U. S. District Court, S. D. of N. Y. (Filed February 20th, 1914.)

3 *Petition for Writ of Habeas Corpus.*

United States District Court, Southern District of New York.

THE PEOPLE OF THE UNITED STATES ex Rel. ALI GEGIEW, TANICH Scheribow, Sabas Zarikoew, Afago Atzkapok, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozakoff, Sachid Pannesshew, Mudar Gurfow, Dyko Gazaff, Gerandika Tabuchow, Zulkarney Mukosoff, Chasir Charsinow, Ashit Guruhoff, Aliens,

against

BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York.

The petition of Morris Jablow respectfully shows to this court, upon information and belief:

1. That your petitioner is a member of the firm of Barnett & Jablow, attorneys and counsellors at law, and that your petitioner's firm has been duly retained on behalf of the above named aliens to sue out a writ of habeas corpus for the purpose of inquiring into the cause of the detention and restraint of the above named aliens and the legality of the action of the officials connected with the Department of Labor in excluding said aliens from admission into the United States.

2. That the above named aliens arrived at the port of New York by the Steamship Czar of the Russian-American Line
4 on the 5th day of February, 1914, and were taken to Ellis Island.

3. That said aliens were then taken before a Board of Special Inquiry at Ellis Island and after being accorded a hearing were ordered excluded from admission into the United States by said Board of Special Inquiry, upon the ground, as alleged, that they were likely to become public charges.

4. That such finding on the part of the said Board of Special Inquiry was not warranted by the evidence brought out at the hearings of said aliens before said Board of Special Inquiry, but was contrary to the evidence adduced thereat, and that such finding on the part of the said Board of Special Inquiry is illegal and unwarranted in law because of the absence of any evidence justifying such a determination, while on the contrary the evidence clearly established the right of said aliens to enter this country.

5. That an appeal from the decision of said Board of Special Inquiry so ordering the exclusion of said aliens was taken to the Secretary of the Department of Labor, who has since dismissed the said appeal and affirmed the order excluding said aliens from admission into the United States, notwithstanding that the records show these aliens are not likely to become public charges, and that there is no evidence to support the conclusion or finding that they are likely, as alleged, to become public charges.

6. That said aliens are now detained and kept at Ellis Island, in New York, and are ordered to be deported by the next steamer of the same line on which they arrived going to the port from which they embarked, and that such sailing is scheduled to take place next Saturday, February 21st, 1914.

7. That the finding or determination of the Board of Special Inquiry excluding said aliens from admission to this country, as above stated, was illegal and unlawful and without authority or jurisdiction on the part of the said Board of Special Inquiry, because of the absence of any evidence sustaining or tending to sustain such finding or determination and that said aliens are now unlawfully imprisoned, detained and restrained of their liberty at Ellis Island, New York Harbor, by or under the direction of Hon. Byron H. Uhl, Acting Commissioner of Immigration at the Port of New York, within the Southern District of New York, acting upon such finding or conclusion of said Board of Special Inquiry, and the decision of the Secretary of the Department of Labor affirming such finding or conclusion, which decision is also illegal, unwarranted and unauthorized, because the Secretary of the Department of Labor was without authority or jurisdiction to exclude said aliens from admission into said country, in the absence of any evidence supporting or tending to support the finding or conclusion that they are likely to become public charges, as alleged, and that said aliens are held in the custody or under the control of or by color of right or authority alleged to be vested in the Department of Labor, Bureau of Immigration.

8. That said aliens are not persons who are applying for admission into the United States in violation of any law, nor are they persons who may for any reason be excluded from admission into this country.

9. That said aliens have not been committed, and are not detained by virtue of any lawful mandate, judgment, decree, final or other process specified in the Revised Statutes of the United States of America, or in the laws of the State of New York, and are not aliens to whom the Chinese Exclusion Acts apply.

6 10. That the alleged cause or pretense of the imprisonment, detention and restraint of said aliens is as follows:

That the Board of Special Inquiry, in excluding these aliens claims that notwithstanding they are in good physical condition and are possessed of various sums not less than $25 and some of them as much as $50 each, are nevertheless persons who are likely to become public charges.

11. That said aliens have not been accorded the rights to which they are entitled under the constitution of the United States, and the statutes applicable thereto, and that their exclusion from the United States is without due process of law, and the alleged order of exclusion is a nullity.

12. That no other or previous application for a writ of habeas corpus herein has been made to any court or judge.

Wherefore, your petitioner prays that a writ of habeas corpus may issue to inquire into the cause and the manner of the imprisonment, detention and restraint of said aliens, directed to Hon. Byron H. Uhl, Acting Commissioner of Immigration, at the Port of New York, or to any other person or persons having the custody, there or elsewhere of said aliens committed to him or them, and requiring the production of the persons of said aliens together with the time and cause of their, and each of their imprisonment, detention and restraint, before a stated term of the District Court of the United States for the Southern District of New York, and for such other or further relief in the premises, as to the court may seem just or proper.

Dated, New York, February 20th, 1914.

MORRIS JABLOW,
Petitioner.

7 BARNETT & JABLOW,
Attorneys for the Above-Named Aliens.

Office & Post-Office Address, No. 149 Broadway, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Morris Jablow, being duly sworn, says:

I am the petitioner named in and who subscribed the foregoing petition, and have read the same, and know the contents of the same, and the said petition is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

MORRIS JABLOW.

Subscribed and sworn to before me, this 20th day of February, 1914.

[SEAL.]

ISAAC B. CANFIELD,
Notary Public, Rockland County.

Certificate filed in New York Co., No. 124.
New York County Register's No. 5231.
Commission expires Mch. 30, 1915.

8 *Return to Writ of Habeas Corpus.*

United States District Court, Southern District of New York.

UNITED STATES ex Rel. ALI GEGIOW, TAMISCH SCHERIBOW, SABAS Zarikoew, Afago Atzkapokk, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozakoff, Sachid Panneschew, Mudar Gurfow, Dyko Gazaff, Gerranduka Tabuchow, Zulkarney Mukosoff, Chasir Charsinow, and Aschid Gurfow,

vs.

BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

A. P. Schell, being duly sworn, deposes and says: That he is a United States Immigration Inspector at the Port of New York, and is in charge of the Law Division in the office of respondent, and on his oath makes this return to the writ of habeas corpus herein, producing in court the bodies of the relators; and for a further return to said writ, he alleges upon information and belief as follows:

First. The relators Ali Gegiow, Tamisch Scheribow, Sabas Zarikoew, Afago Atzkapokk, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozohoff and Sachid Panneschew are aliens who arrived at the Port of New York from Libau, Russia, on the 5th day of February, 1914, on S/S "Czar" and applied for admission into the United States.

9 Second. It not appearing to the Examining Immigrant Inspector that the said aliens were clearly and beyond a doubt entitled to land in the United States, they were held and detained for examination in relation thereto before a Board of Special Inquiry at the United States Immigrant Station at Ellis Island, New York Harbor.

Third. That thereafter, and on the 7th day of February, 1914, the said aliens were duly examined before a duly constituted Board of Special Inquiry at the United States Immigrant Station at Ellis Island, New York Harbor, in the matter of their application for admission into the United States; and a transcript of the record of such examination is annexed hereto and made a part hereof and marked Exhibit "A."

Fourth. That on the said 7th day of February, 1914, after duly considering the evidence so adduced, the said Board of Special Inquiry found that the said aliens were members of the excluded classes, in that they were likely to become public charges for the following, among other reasons: That they arrived here with very little money, and are bound for Portland, Oregon, where the reports of industrial conditions show that it would be impossible for these aliens to obtain employment; that they have no one legally obligated here to assist them; and upon all the facts, the said aliens were upon the said grounds duly excluded from admission into the

United States and ordered deported to the country whence the
came.

Fifth. The said aliens thereupon appealed to the Secretary
Labor at Washington, D. C., from the finding of the Board
Special Inquiry; and annexed hereto and made a part hereof an
marked Exhibit "B" is a true copy of a letter from Byron H. Uh
Acting Commissioner of Immigration at the Port of Ne
10 York, dated February 10, 1914, addressed to the Commi
sioner General of Immigration at Washington, D. C., fo
warding the appeals of the said aliens.

Sixth. That the relators Mudar Gurfow and Dyko Gazaef a
aliens who arrived at the Port of New York from Libeau, Russi
on the 5th day of February, 1914, on S/S "Czar," and applied fo
admission into the United States.

Seventh. It not appearing to the Examining Immigrant In
spector that the said aliens were clearly and beyond a doubt entitle
to land in the United States, they were held and detained for ex
amination in relation thereto before a Board of Special Inquiry a
the United States Immigrant Station at Ellis Island, New Yor
Harbor.

Eighth. That thereafter, and on the 10th day of February, 1914
the said aliens, Mudar Gurfow and Dyko Gazaef, were duly ex
amined before a duly constituted Board of Special Inquiry at th
United States Immigrant Station at Ellis Island, New York Har
bor, in the matter of their application for admission into the Unite
States; and a transcript of the record of such examination is an
nexed hereto and made a part hereof and marked Exhibit "C."

Ninth. That on the said 10th day of February, 1914, after duly
considering the evidence so adduced, the said Board of Special In
quiry found that the said aliens, Mudar Gurfow and Dyko Gazaef
were members of the excluded classes in that they were likely to
become public charges for the following, among other reasons: The
industrial conditions at Portland, Oregon, and the vicinity, for
which place these aliens are bound, are such as precludes the possi-
bility of these aliens obtaining employment, and the money
11 in their possession is not sufficient to maintain them, and
they have nobody legally obligated to assist them; and, upon
all the facts, the said aliens were upon the said grounds duly ex-
cluded from admission into the United States and ordered deported
to the country whence they came.

Tenth. The said aliens, Mudar Gurfow and Dyko Gazaef, there-
upon appealed to the Secretary of Labor at Washington, D. C., from
the finding of the Board of Special Inquiry; and annexed hereto
and made a part hereof and marked Exhibit "D" is a true copy
of a letter from Byron H. Uhl, Acting Commissioner of Immigra-
tion at the Port of New York, dated February 11, 1914, addressed
to the Commissioner General of Immigration at Washington,
D. C., forwarding the appeal of the said aliens.

Eleventh. That the relators Geranduka Tabuchow, Zulkarney
Mukosoff, Chasir Charsinow and Aschid Gurfow are aliens who
arrived at the Port of New York from Libau, Russia, on the 5th

day of February, 1914, on S/S "Czar," and applied for admission into the United States.

Twelfth. It not appearing to the Examining Immigrant Inspector that the said aliens were clearly and beyond a doubt entitled to land in the United States, they were held and detained for examination in relation thereto before a Board of Special Inquiry at the United States Immigrant Station at Ellis Island, New York Harbor.

Thirteen. That thereafter, and on the 10th day of February, 1914, the said aliens, Geranduka Tabuchow, Zulkarney Muhosoff, Chasir Charsinow and Aschid Gurfow, were duly examined before a duly constituted Board of Special Inquiry at the United
12 States Immigrant Station at Ellis Island, New York Harbor in the matter of their application for admission into the United States; and a transcript of the record of such examination is annexed hereto and made a part hereof and marked Exhibit "E."

Fourteenth. That on the said 10th day of February, 1914, after duly considering the evidence so adduced, the said Board of Special Inquiry found that the said aliens were members of the excluded classes, in that they were likely to become public charges for the following, among other reasons: That the reports of the industrial conditions of Portland, Oregon, and the vicinity, for which place these aliens are bound, are such that the aliens could not obtain employment; that the money in their possession is insufficient to support them, and that they have nobody legally obligated to assist them; and upon all the facts, the said aliens were upon the said grounds duly excluded from admission into the United States and ordered deported to the country whence they came.

Fifteenth. The aliens, Geranduka Tabuchow, Zulkarney Mukosoff, Chasir Charsinow and Aschid Gurfow thereupon appealed to the Secretary of Labor at Washington, D. C., from the finding of the Board of Special Inquiry; and annexed hereto and made a part hereof and marked Exhibit "F" is a true copy of a letter from Byron H. Uhl, Acting Commissioner of Immigration at the Port of New York, dated February 11, 1914, addressed to the Commissioner General of Immigration at Washington, D. C., forwarding the appeals of the said aliens.

Sixteenth. That the said Secretary of Labor, after duly considering the evidence presented in the records, duly affirmed the excluding decisions of the Boards of Special Inquiry, and duly directed the deportation of all of the aforementioned aliens from the United States, as will appear by a letter from the Acting
13 Commissioner General of Immigration, dated February 16, 1914, addressed to the Acting Commissioner of Immigration, Ellis Island, N. Y. H., a true copy of which said letter is annexed hereto and made a part hereof and marked Exhibit "G."

Seventeenth. That the said aliens are now held in the custody of the Acting Commissioner of Immigration at the Port of New York, under and by virtue of the said letter from the Commissioner General of Immigration at Washington, D. C., to the Acting Commissioner of Immigration at the Port of New York, directing the deportation of said aliens, and that the said aliens are awaiting de-

portation to the country whence they came, in conformity with the laws of the United States of America in such case made and provided.

That the sources of deponent's information and the grounds for his belief as to the facts herein recited are official records thereof now on file in the office of the Commissioner General of Immigration at Washington, D. C., and official communications to the Acting Commissioner of Immigration at the Port of New York.

Wherefore, deponent prays that the writ of habeas corpus herein may be dismissed, and the said aliens remanded to the custody of the Acting Commissioner of Immigration at the Port of New York, to be dealt with by him according to law.

A. P. SCHELL.

Sworn to before me this 27th day of February, 1914.
FREDERICK L. CAMPBELL,
Notary Public, Kings County, No. 187.

Certificate filed in New York County.
No. 61, New York County.
Register's No. 5164, New York County.
Register's No. 6,178, Kings County.
New York Commission expires March 30, 1915.

14 EXHIBIT A.

N. Y. Form 192.

U. S. Department of Labor, Immigration Service.

Simpson—33, 36, 39, 42, 45, 47, 49, 51, 53, 55, 57.

Names of Aliens: Gegiew Ali, 21, male, No. 1; Tabuchow, Kasin, 28, male, No. 50; Scheribow, Tamisch, 30, male, No. 59; Zarijkoeff, Bajirbek, 22, male, No. 61; Balkarow, Magvinet, 19, male, No. 80; Atzkapokk, Afago, 20, male, No. 2; Zarikoew Sabas, 21, male, No. 6; Zarikoew Dowkin, 25, male, No. 7; Wendugew, Sarakinn, 30 male, No. 30; Kobalowe, Bakan, 17, male, No. 27; Tawkozakoff, Tuta, 22, male, No. 26.

Before a Board of Special Inquiry held at Ellis Island, New York Harbor, N. Y., this 7th day of Feb., 1914.

Present: Messrs. Burke (chmn.) Harper and Bruno, Insps.

Osetins—Kabordinians.

10:10 to 11:40.
Ex. ss. Czar, Russ. Line, Feb. 5/14:
C. L.,
Book Insp.
(Mr. Volvick, interpreter with Ali Gegiew, acting as interpreter for other aliens.)

Aliens sworn by Inspector Burke, testified:

ALI GEGIEW, 21; with others; natives and residents of Ansorowo, Russ, where I lived with widowed mother Solina, in good health; single; read and write; came on the Czar from Libau; paid my own passage; out of my own money; farm laborer; never in the U. S. Going to mother's brother Hangery Nadgerieff, 173 Front Street, Portland, Oregon, $40. Ticket to Portland. Uncle is three years in Portland. Received a letter from him about two mos. ago; he only sent his greetings and wrote he is doing well digging ditches.

Q. How is it you and your travelling companions are all going to the same destination coming from the same locality?

A. We are all going to different persons in the same city.

Q. But you must have some assurance you would obtain employment otherwise you would not have spent all this money, coming here without this assurance?

A. Every one of us received letters from his relative or friend saying work is going on well there.

Q. Any of the letters indicate that upon your arrival there you would go to work at the current rate of wages?

A. No, but that we expect work to be found as they wrote there was work in plenty there.

Q. If you were informed that there were a great many men at present unemployed and the municipal authorities were making efforts to inaugurate public work in order to relieve their distress, would you still wish to go there?

A. I was assured, and some others, by their relatives, if you come and don't find any work they will support us for any length of time, until work picks up.

Q. Why would it not have been better to have wrote just prior to the time you started for U. S. and ascertained whether there was work there or not?

A. They assured us they will find some work for us.

Q. Have you any offer or promise of employment at Portland or elsewhere in the U. S.?

A. There is work there, but there is none ready for us.

Q. Did anybody inform you that if you had acknowledged that you were coming here with work ready and waiting for you that it might possibly prevent your admission, and that of your travelling companions?

A. No.

Q. Do you believe in the practice of Polygamy?

A. No. I believe in having one wife.

Alien, TABUCHOW KASIN:

(Writ does not apply to this alien.)

28. Travelling with several others; natives and resident of Ansorowo, Russ, where I left father Talia, in good health; cannot read nor write; single; came on the Czar, from Libau; father in Russia paid passage; farm laborer; never in the U. S. Going to

friend Low Bekoldiov, 169 Front Street, Portland, Ore. Ticket to Ptld. $25. My friend is one yr. in this country, and doing some laboring work. I received a letter two mos. ago from my father which was read for me.

Q. Your name mentioned in that letter?

A. Yes.

Q. In this letter did he invite you to come here?

A. Only saying if you choose you can come over here.

Q. What did he say about labor conditions in Portland?

A. He wrote I am working and if you come, I will find work for you.

Q. Say what wages were being paid?

A. No.

Q. From what you read in this letter you feel sure you would secure immediate employment.

A. No.

Q. Should you be unable to secure employment when your money was exhausted, what would you do?

A. He wrote if I don't find work he will help me out of his money until I get work.

Q. How do you know he has any money?

A. He wrote he has money.

17 Q. Anything said in this letter about your companions coming here too?

A. No.

Alien, TAMISCH SCHERIBOW:

30; travelling with several others; native and resident of Ansarowo, Russia; where I left older brother Nachna, in good health; single; cannot read nor write; came on the Czar from Libau; paid the passage out of my own money; farm laborer; never been in the U. S. *Doing* to friend Tasso Kachtykoff, who is there 18 mos., 169 Front Street, Portland, Ore. Ticket to Ptld., $41.

Q. Your friend invite you to come?

A. About two months ago I received a letter from him saying if I wanted to come I could come, there is plenty of work.

Q. He say what wages you could earn?

A. No.

Q. Do you feel that you have employment assured at your destination?

A. I don't.

Q. Why do you go there?

A. I am going there to look for work. I have friends there.

Q. We have information that there is a large number of people out of employment there, and knowing this, do you still desire to go there?

A. Yes. My friend will help me find work if I cannot find work soon.

Q. If you were offered employment in the City of New York at the prevailing rate of wages, would you not rather accept that than go to a place where there is no work to be had?

A. I want to be with my friend.
Q. If you were not able to secure employment, and your money was exhausted, what would you do?
A. My friend will help me.

18 Alien, BAJIRBEK ZARIJKOEFF:

(Writ does not apply to this alien.)

22; travelling with several others; native and resident of Ansorowo, Russia, where I left widowed mother, Salimot, in good health; cannot read nor write; came on the Czar, from Libau; my mother paid my passage, farm laborer; never in the U. S. Going to sister's son; Chizir, Kobulajoff, 173 Front Street, Portland, Ore. Ticket to Portland, $25.
Q. Who wrote this address for you?
A. That was copied in my village from letter by the storekeeper.
Q. How long is your nephew in this country?
A. Two years.
Q. Did you ever receive a letter from him?
A. Three or four months ago.
Q. Did you read the letter?
A. It was read to me at the store, by the storekeeper.
Q. Was your name mentioned in that letter?
A. Yes.
Q. Did he invite you to come here?
A. No.
Q. Then why do you come here?
A. I knew he was sending money home, and writing home that he had good work, and I also asked him in the letter whether to come or not, and he says just as you wish, but if you come there will be work.
Q. State what wages you would receive?
A. No.
Q. Did the letter you received lead you to believe you would secure immediate employment there?
A. No.
Q. Now, in the event you should not be able to secure employment, and your money became exhausted, what would you do then?
A. My nephew would help me.
Q. We have information that there is a large number of laborers out of employment in Portland, at the present time. How do you know that your nephew is in a position to assist you?
A. I knew he was making big money. He must have money.

19 Alien, MAGVINET BALKAROW:

(Writ does not apply to this alien.)

19, travelling with several others; native and resident of Ansorowo, Russ., where I left parents, Hamid and Baszytkas, in good health; single; cannot read nor write, came on the Czar from Libau; parents paid passage; farm laborer; never in the U. S. Going to Chado-

chaziko, brother, 169 Front Street, Portland, Oregon. Ticket. $19. Brother is one year in this country. Heard from him two months ago. He does laboring work.

Q. Do you know what kind of work he does?

A. I don't.

Q. In his letters home did he state that if you came here you would be employed where he is employed?

A. No. He said he is working and doing well—now come—there—you will find something.

Q. Have you any offer or promise of employment in Portland or elsewhere?

A. No.

Alien, AFAGO ATZKAPOFF:

(Writ does not apply to this alien.)

20. Travelling with several others; native and resident of Anasarowo, Russ., where I left father Minbulat, in good health; single; cannot read nor write; came on the Czar, from Libau; father in the old country paid passage; farm laborer; never in this country before; going to sister's husband Kurman Achajeff, 363 First St., Portland, Ore. Ticket to Portland; $27.

Brother-in-law is one year in this country; heard from him two months ago; don't know how he is employed.

Q. Did he state in his letter that upon your arrival here, he would obtain employment for you where he was employed?

A. If there will be an opening he will place me at work where he is.

Q. Do you believe you have an offer or promise of employment in Portland or elsewhere?

A. No.

SABAS ZARIKOEW:

21; travelling with several others; native and resident of Ansorowo, Russia; where I left widowed mother Soparchan, in good health; single, cannot read nor write; came on the Czar from Libau; paid the passage out of my own money; farm laborer; never in the U. S. Going to friend Sultan Galachieff, 173 Front Street, Portland, Ore. Ticket, $25.

Q. Have you any relatives in the U. S.?

A. No.

Q. What induced you to come to this country?

A. My friend wrote to me he is doing well now. Plenty of work now. He says he don't know how long that will last but if you come there, and don't find any work, I will help you. I don't know just what he is doing, or what wages he received. I received a letter about four months ago.

Q. How long is it since you made up your mind to come to this country?

A. About the time when the letter was received.

Q. Did you read the letter?

A. A neighbor—the storekeeper, read it.
Q. After hearing read the contents of this letter, do you feel assured that you would secure employment upon arrival at your destination?
A. No, but I feel that I will find work there.
Q. You have but a small amount of money and when your money is exhausted what will you do then?
A. My friend to whom I am going is there four years, and I am sure he will help me.
Q. Did your friend state in this letter that he had spoken to his boss or anyone there that when you came there you would secure immediate employment?
A. No.

DOWKIN ZARIKOEW:

25, with several others; natives and residents of Ansorowo, Russ., where I left parents Csadgy Mussa, Denka, in good health; single, cannot read nor write; came on the Czar from Libau; paid the passage with my own money; farm laborer; never in the U. S. before; going to sister's son Tasultan Karajeff, 169 Front Street, Portland, Ore. Ticket: $25.

By Mr. BURKE:

Q. How long has your nephew been in this country?
A. Three years. Heard from him three months ago.
Q. What did he state in that letter relative to work, and the rate of wages which was being paid?
A. He said he is working and doing well, and did not state the wages.
Q. Have you any other relatives here?
A. No.
Q. Have you any offer or promise of employment at Portland, or elsewhere?
A. No.

Alien, SARAKINN WENDUGEW:

30; with several others; native and resident of Ansorowo, Russ., where I left my wife, Chani, aged 27 and three children, one to four years, in good health; cannot read nor write; came on the Czar from Libau; paid my own passage; farm laborer; never in the U. S. Going to friend Kosna Orkasoff, 173 Front Street, Portland, Oregon. $25; ticket; friend is one year in this country. Heard from my friend two months ago.
Q. Have you any relatives in the United States?
A. No.
Q. Have you any offer or promise of employment in Portland or elsewhere?
A. No.
Q. How have you provided for your family?
A. I left home in care of my brothers, and mother on our farm.

Q. Where did you get the money you show here, and with which you paid your passage?

A. From my mother, from our common fund.

Alien, BAKAN KOVALOZW:

(Writ does not apply to this alien.)

17; travelling with several others; native and resident of Ansorowo, Russia, where I lived with a widowed mother, Bagu, in good health; single; cannot read nor write; came on the Czar from Libau; mother paid passage; farm laborer; never in the United States. Going to sister's husband, Dofa Karojeff, 320 Front Street, Portland, Oregon, $25, ticket. Heard from brother-in-law three months ago.

Q. Did he invite you to come to the United States at this time, with the assurance that he would obtain employment for you?

A. No. There was no reply to my inquiry whether or not I should come to him.

Q. Why did not you wait until you got an answer to your inquiry before you came?

A. Some people just returned from our village to the United States who were working together with my brother-in-law,
23 and they said he was working and making good money.

Q. Have you an offer or promise of employment in Portland or elsewhere?

A. No.

Alien TAWKOZAKOFF, TUTA:

22; travelling with others; native and resident of Ansorowo, Russia, where I left mother Chomsot, in good health; father is dead; single; cannot read nor write; arrived on the Czar from Libau; mother in Europe; paid passage; farm laborer; never in the U. S. Going to friend Bochton Kobolajeff, 173 Front Street, Portland, Ore. Ticket: $25.

Q. How long is your friend in the United States?

A. Two years. Heard from him two months ago.

Q. Did he write you to come here with the assurance that he would obtain employment for you?

A. No.

Q. Have you any relatives in the United States?

A. No.

(Continued in the minutes of Feeney, Board Secretary, page 28, same date.)

M. H. STIMPSON, *Secretary.*

24 N. Y. Form 192.

U. S. Department of Labor,
Immigration Service.

Names of Aliens: F. 28 Scharyanoff Schachaban 20 M; Panneschew Sachid 24 M. Rus-Kahardinas.
Before a Board of Special Inquiry held at Ellis Island, New York Harbor, N. Y. This 7th day of Feb. 1914, at 11:45.
Present: Inspcs. Burke (chmn.) Harper, Bruno. Int. Volovick.
S 1 18 & 11.
Continued from Stimp, page 59.
S/S Czar 2/5/14.
C L with 18 others Book.

ALIEN, called and sworn by Inspector Burke, testified:

(Writ does not apply to this alien.)

By first alien: Name and age as above; travelling with several others; native and resident of Ansorowo, Russia where I have father Eli Murza, in good health; mother dead; single; cannot read or write; arrived on the Czar from Libau; father in Russia; paid my passage; farm laborer; never here before; going to my uncle; father's sister's husband Osman Kysiticoff, 363 Third Street, Portland, Oregon, ticket and $27.

Q. Have you any other relatives in the United States?
A. No.
Q. When have you received any letters from your uncle?
A. Three months ago.
Q. Did he invite you here with the understanding that you will be employed where he is working?
A. No.
25 Q. Do you know how your uncle is employed?
A. No.
Q. Have you any offer or promise of work at Portland or elsewhere?
A. No.

SECOND ALIEN, called and sworn by Inspector Burke, testified:

Name and age as above; travelling alone; native and resident of Ansorowo, Russia, where I have wife Zusonachan twenty years in good health; no children; cannot read or write; arrived on the Czar from Libau; paid my own passage; farm laborer; never here before; going to my friend, Tako Czeyodujiff, 173 Front Street, Portland, Ore., $25 and ticket.

Q. Have you any relatives in the United States?
A. No.
Q. Why are you coming here with no relatives in the United States who might assist you until you secure employment?
A. Friend to whom going promised to help me.
Q. When did you hear from this man?

A. Two months ago.

Q. State in your own way just what he wrote that prompted you in coming here at this time?

A. He didn't write anything that made me come, but made up my mind myself.

Q. If you were offered employment in N. Y. C. at the current rate of wages, with a refund for your railroad ticket, would you accept it here?

A. I am not familiar here and want to go to my friends.

Q. Then you have some assurance or some knowledge that inclines you to the belief that you would obtain immediate employment there, otherwise you would accept employment that would be offered you in N. Y. C.?

26 A. I don't care to stay here alone, in case I get sick, I want to go to my friends.

Q. Have you any offer or promise of work at Portland or elsewhere?

A. No.

Q. We have information that there is a great many men unemployed, and no prospect of your obtaining employment, you have little money, what are you to do if your money is exhausted and you fail to obtain employment?

A. Many friends from our vollage there will help me.

To Aliens:

Q. What further have you to say why you should be permitted to proceed, this board being about to deny you admission?

A. Nothing. We are able to do any kind of work.

The board is unanimous in the opinion that these aliens are persons likely to become a public charge for the following among other reasons:

They arrive here with very little money and in view of the recent employment reports of industrial conditions at Portland and vicinity, the board believes it would be impossible for them to obtain employment at manual labor. The money in their possession is insufficient to meet their requirements until such time as they might hope to obtain employment. They have no one here legally obligated to assist them in case of need. Two of the aliens have wives and dependent families in their native country. If admitted there is a likelihood of their becoming a public charge. Excluded and ordered deported.

To Aliens:

Under the law you are entitled to an appeal from the decision of this board denying you the right to land to the Secretary of Labor at Washington for a review by him of such decision. If de-

27 ported it will be at the expense of the S. S. Co. which brought you here. Do you understand your right?

A. Yes.

FEENEY, *Secretary.*

EXHIBIT B.

Department of Commerce and Labor,
Immigration Service.

98614/285.

OFFICE OF
COMMISSIONER OF IMMIGRATION,
ELLIS ISLAND, NEW YORK HARBOR, N. Y.

February 10, 1914.

Commissioner-General of Immigration, Washington, D. C.:

I transmit appeal of Ali Gegiew, 21; Kasiin Tabuchow, 28; Tamisch Scheribow, 30; Bajirbek Zarijkoeff, 22; Magvinet Balkarow, 19; Afago Atzkapokk, 20; Sabas Zarikoew, 21; Dowkin Zarikoew, 25; Sarakinn Wendugew, 30; Bakan Kobaloew, 17; Tuba Tewkozakoff, 22; Schachaban Scharyanoff, 20; and Sachid Panneshew, 24; natives of Russia, ex. SS. "Czar," February 5, 1914.

This is the case of thirteen Russian (Osetin) Kabordinians, who give as their destination Portland, Oregon. They all have railroad transportation to destination and an average of about $25. Six have no relatives in the United States and the other seven claim relatives of various degrees of relationship, none of whom is, however, under legal responsibility to assist or care for them. Only one of
28 the entire party can either read or write. The remainder are illiterate. Their ignorance has a tendency to cause them to form a gang or clique, which constitutes a detriment to any community of which they might become members, and also renders them a much more easy prey to exploitation by unscrupulous persons. The information contained in the daily press of recent date is to the effect that industrial conditions in the northwest, especially in the vicinity of Portland, Oregon, are very bad. I fully agree with the board, that there is grave doubt whether these aliens will be able, if admitted, to secure employment of any kind at their destination, and recommend their deportation.

The SS. "Birma" will sail at two p. m. February 21.

(Sd.) BYRON H. UHL,
Acting Commissioner.

Copy:
O. W. M.

EXHIBIT C.

N. Y. Form 192.

U. S. Department of Labor,
Immigration Service.

Gal. 78.

Names of Aliens:

Gurfow, Mudar, male, 30. Russ-Kabardinian.
Gazaef, Dyko, male, 20. Russ-Ossitin.

Before a Board of Special Inquiry held at Ellis Island, New York Harbor, N. Y., this 10th day of February, 1914—9:45.

29 Present:

Inspectors Burke (chmn.), Bruno and Donahue.

S. I. 84 & 85.

S/S. "Czar" R. A. 2/5/14, LPC & CL, Insp. Schwartz.

"1—Placed in hospital upon arrival; returned from hospital 2/9/14—1:15 p. m. Has railroad ticket & check for $25 on SS. Line. With others on same ship.

2—Placed in hospital upon arrival; returned from hospital 2/9/14—1:20 p. m. Has railroad ticket & check for $25 on SS. Line. With others on same ship."

Report of Immigrant Hospital (Mudar Gurfow):
Diagnosis: observation; result, recovered; Discharged 2/9/14.
Report of Immigrant Hospital (Dyko Gazaef):
Diagnosis: observation; result, recovered; Discharged 2/9/14.
(Interpreter Volovick, through alien Ali Ge Gieff.)

Aliens, sworn by Insp. Burke, testified:

Mudar Gurfow 30 traveling with my friend Dyko Gazaef 20; natives and residents of Ansorowo, Russia, where I left my brother Gizer, in good health, where my friend leaves his wife Babino, 20, and a child of one year, in good health; we do not read or write; arrived on ss "Czar" from Libau; paid passage from our own money; farm laborers; I am going to my friend Genarduka Musokoff, 173 Front St., Portland, Oregon. My friend is going to his father's brother, Mutik Gazaeff, 363 First St., Portland, Oregon; never here before; tickets to destination and orders for $25 each.

30 To alien Mudar Gurfow:

Q. How long is your friend in the U. S.?
A. One year.
Q. Do you know how he is employed?
A. I do not know.
Q. Have you had any correspondence with him?

A. No.

Q. Why are you going there, if he hasn't written you and invited you to come?

A. Because there are people I know, I do not know people elsewhere.

Q. In the event of you not being able to obtain employment there—your money is insufficient to keep you any length of time—what are you to do?

A. My friend will help me, and other friends will help me.

Q. Should they be in no position to assist you, they being out of employment and having no money, then what are you to do?

A. Some of my friends have money, they will help us and I will find some work.

Q. Have you any offer or promise of employment at Portland or elsewhere?

A. No.

To alien Dyko Gazaef:

Q. When have you heard from your uncle?

A. About two months ago.

Q. What did he state in that letter that prompted your coming at this time?

A. He did not say anything about work, only sent me greetings.

Q. Do you expect to work where he is employed?

A. If I can find work with him so much the better, if not, I will look elsewhere.

Q. Do you know how he is employed?

A. I don't know.

Q. How long has he been here?

A. One year.

Q. Have you any offer or promise of employment?

A. No.

31 To aliens:

Q. What further have you to say in support of your wishes to land? This Board has information that there is a great many men unemployed at Portland and vicinity?

A. We would try our luck anyhow to go there, expect to find some work.

It is the unanimous opinion of the Board that these aliens are persons likely to become a public charge for the following among other reasons:

The reports of industrial conditions at Portland and vicinity is such as preclude the possibility of these aliens obtaining employment at this time at their destination; the money in their possession is insufficient to keep them until such time as they might obtain employment; they have nobody legally obligated to assist them in case of need, and if admitted, there is a likelihood of their becoming a public charge.

There is no evidence, however, that they are coming in violation of the Alien Contract Labor Law.

Excluded and ordered deported.

To aliens: Under the law you are entitled to appeal from the decision of the Board denying you the right to land, to the Secretary of Labor at Washington for a review by him of such decision. You will be returned at the expense of the steamship company which brought you.

Q. Do you understand your rights?

A. Yes.

G. A. LARKIN, *Secretary.*

32 EXHIBIT D.

Department of Commerce and Labor,
Immigration Service.

98614/317.

OFFICE OF
COMMISSIONER OF IMMIGRATION,
ELLIS ISLAND, NEW YORK HARBOR, N. Y.

February 11, 1914.

Commissioner-General of Immigration, Washington, D. C.:

I forward herewith appeal of Mudar Gurfow, aged 30, and Dyko Gazef, aged 20, natives of Russia, ex. SS. "Czar," February 5, 1914.

This appeal relates to a Kabardinian of 30 and an Osetian of 20. They want to go to Portland, Oregon, and give the same addresses as those furnished by some other aliens whose appeal was forwarded today. They came under the same circumstances and their general appearance is that of the other group, of which I have no doubt they are members. What I have heretofore said in reference to those new arrivals applies equally to these appellants and, for the reasons stated by the board, I concur in the excluding decision.

SS. "Birma" will sail at two p. m. February 22.

U/EMP.

Copy:
O. W. M.

Exact copy as signed by

BYRON H. UHL,
Acting Commissioner.

33 EXHIBIT E.

N. Y. Form 192.

U. S. Department of Labor,
Immigration Service.

Gal. 90.

Names of Aliens:
Kumukoff, Mill, male, 31.
Tabuchow, Geranduka, male, 23.
Mukosoff, Zulkarney, male, 26.
Charsinow, Chasir, male, 26.
Gurfow, Aschid, male, 35.
Russ-Kabardinian.

Before a Board of Special Inquiry Held at Ellis Island, New York Harbor, N. Y., this 10th Day of February, 1914—12:45.

Present:

Inspectors Burke (chairman), Bruno & Donahue.
S I 86, 87, 88, 89, (—).
S/S "Czar" R. A. 2/5/14, (1) PD, LPC & CL (2-5) LPC & CL, Inspector, Schwartz.
All placed in hospital upon arrival; returned from hospital 2/10/14—11:40 to 12m. All have railroad tickets & checks for $25—with others, also S I.
Immigrant Hospital Reports (for aliens as above noted): All discharged 2/10/14.
Medical Certificate: (Mill Kumukoff.)
(Writ does not apply to this alien.)
This is to certify that the above described person has this day been examined and is found to be afflicted with varix of right lower extremities, which affects ability to earn a living.
34 (s) M. H. Foster, J. H. Smith, E. W. Scott (surgeons).
(Interpreter Volovick, through alien Ali Gegieff.)
Aliens, Sworn by Insp. Burke, testified:
(Writ does not apply to this alien.)
Mill Kumukoff, 31, traveling with a number of others; born in Ansorowo, Russia, where I left my widowed mother, Katu, in good health; single; cannot read or write; arrived on ss "Czar" from Libau, paid my own passage; farm laborer; never here before; going to my sister's husband Hamyd Achaeff, 363 First St. Portland, Oregon; ticket to destination and $22.
Geranduka Tabuchow, 23, traveling with several others; native of Ansorowo, Russia, where I left my widowed mother Nauszy, in good health; single; cannot read or write; arrived on ss "Czar" from Libau; paid my own passage; farm laborer; never here before; going to my sister's husband, Genarduk Musokoff, 173 Front St., Portland, Oregon; ticket to destination and $35.

Zulkarney Mukosoff, 26, traveling with several others; native and resident of Ansorowo, Russia, where I left my father Batye, in good health; single; cannot read or write; arrived on ss "Czar" from Libau; paid my own passage; farm laborer; never here before; going to my sister's son, Husin Kelemetoff, 363 1st St., Portland, Oregon; ticket to destination and $25.

Chasir Charsinow, 26, traveling with several others; native and resident of Ansorowo, Russia, where I have my brother, Salem, in good health; single; cannot read or write; arrived on ss "Czar" from Libau; paid my own passage; farm laborer; never here before; going to my friend, Tolib Tchegodiujeff, 173 Front St., Portland, Oregon; ticket to destination and $25.

Aschid Gurfow, 35, traveling with several others; native and resident of Ansorowo, Russia; single; cannot read or write; arrived on ss "Czar" from Libau; paid my own passage; farm laborer; never here before; going to my sister's son, Batirbek Tchegodujeff, 363 First St., Portland, Oregon; ticket to destination and $51.

By Insp. BURKE (to alien Mill Kumukoff):

Q. How long is your relative to whom you are going in the U. S.?
A. One year.
Q. When have you heard from him?
A. Two months ago.
Q. What did he state in that letter that prompted your coming at this time?
A. There was nothing in that letter of that sort.
Q. Have you any offer or promise of employment at Portland or elsewhere?
A. No.

(To alien Geranduka Tabuschow):

Q. How long is your relative to whom you are going in the U. S.?
A. One year.
Q. When have you heard from him?
A. About three months ago.
Q. Did he in his letter encourage you to come here in the hope of obtaining immediate employment on your arrival at Portland?
A. No.
Q. Have you any offer or promise of employment at Portland, or elsewhere?
A. No.

(To alien Zulkarney Mukosoff):

Q. How long is your nephew in the U. S.?
A. Year and a half.
Q. Did he invite you to come here at this time?
A. Yes.
Q. In that invitation to come here, did he assure you that you would find immediate employment on your arrival at Portland?
A. No.

Q. Have you any offer or promise of employment at Portland or elsewhere?
A. No.

(To alien Chasir Charsinow):

Q. How long is your friend in the U. S.?
A. One year.
Q. When have you heard from him?
A. Four months ago.
Q. In that letter, did he encourage your coming with the assurance that you would obtain immediate employment?
A. No.
Q. How is your friend employed?
A. I do not know.
Q. Have you any offer or promise of employment at Portland or elsewhere?
A. No.

(To alien Aschid Gurfow):

Q. How long is your nephew in the U. S.?
A. One year.
Q. When did you hear from your nephew?
A. Four months ago.
Q. Do you know how your nephew is employed?
A. No.
Q. Why didn't you write to your nephew and ascertain the conditions of labor, where there was any likelihood of your obtaining employment, before you come such a great distance and expended all this money?
A. Simply because my relative wrote to me that he has work and others are working, and I thought I could find work.
37 Q. If you are informed, and your traveling companions, that there was a great many men unemployed and it was a problem with the municipal authorities to try and help the people who were in distress there, owing to the lack of employment, would you still wish to go there?
A. We will find something to do, if not our friends will help us.
Q. Have you any offer or promise of employment at Portland or elsewhere?
A. No.

(To aliens):

Q. You are being informed that there is no work in Portland and it is possible that your friends are out of employment now and in distress, would you men be willing to accept employment in other parts of the U. S., if the same was available, with a refund for your railroad transportation?
A. We want to go to Portland where we have friends.
Q. Then you have some assurance that you will obtain employment, otherwise a body of men—about 20—would not need friends if they could get employment?
A. Yes, but if in any other place we lose our work and remain

without friends, who will help us? The whole bunch of our friends are there.

Q. Who helped the original countrymen of yours, who come to the U. S., went to the Pacific coast?

A. Yes, we will go in another place also if we had work.

It is the unanimous opinion of the Board that these aliens are persons likely to become a public charge for the following among other reasons:

The reports of industrial conditions at Portland and vicinity are such as to incline this Board to the belief that the aliens could not obtain employment at manual labor at this season of the year; the money in their possession is insufficient to meet their needs until such time as they might hope to obtain employment; they
38 have nobody legally obligated to assist them, and if admitted, there is a likelihood of their becoming public charges.

In the case of the alien Mill Kumukoff, his certified condition is such as may affect his ability to earn a living.

(Writ does not apply to last mentioned alien.)

Excluded and ordered deported.

To aliens: Under the law you are entitled to appeal from the decision of the Board denying you the right to land, to the Secretary of Labor at Washington for a review by him of such decision. You will be returned at the expense of the steamship company which brought you.

Q. Do you understand your rights?

A. Yes.

G. A. LARKIN.

EXHIBIT F.

Department of Commerce and Labor,
Immigration Service.

98614/319.

OFFICE OF COMMISSIONER OF IMMIGRATION,
ELLIS ISLAND, NEW YORK HARBOR, N. Y.,
February 11, 1914.

Commissioner-General of Immigration, Washington, D. C.:

I forward herewith appeal of the following named aliens, natives of Russia, ex SS "Czar" February 5, 1914:

39 Mill Kumukoff, 31; Zulkarney Mukoseff, 26; Geranduka Tabuchow, 23; Chasir Charsinow, 26; Aschid Gurfow, 35.

This is another group of five Russian Kabardinians who desire to go to Portland, Oregon. One of them is certified to have varix of right lower extremities, affecting his ability to earn a living. They are a peculiar appearing group, but this may be due to the fact that, while they are not exactly bald, there seem to be but a few hairs left here and there. As they were in the hospital under observation,

I assume that this is not due to favus. They speak some unusual dialect and none of our interpreters can talk to them, it having been necessary to get the record through one of their companions who spoke Russian as well as their dialect. Unless the published accounts as to labor conditions in Portland are very erroneous, there is now a great over-supply of unskilled labor in that place, and the coming of these strange people at this season of the year and under prevailing conditions is very extraordinary. I am firmly convinced that some one is inducing them to come here in violation of law, but by reason of the difficulty of communicating with them and the probable coaching which has already occurred, it is extremely doubtful whether anything definite can be secured upon this point. Disregarding this possibility they are without doubt likely to become public charges under prevailing conditions and, to my mind are an undesirable addition to our population. I forwarded to you yesterday an appeal of a still larger group and with this mail forward still another appeal. I strongly recommend the dismissal of the appeal.

SS "Birma" will sail at two p. m. February 21.

(Signed) BYRON H. UHL,
Acting Commissioner.

Copy.
O. W. M.

40 EXHIBIT G.

53710/408-411-417. FEBRUARY 16, 1914.

Acting Commissioner of Immigration, Ellis Island, N. Y. H.:

The Bureau acknowledges the receipt of your letters of February 10, 11 and 11 (98614/285-317-319), transmitting records on appeal in the cases of Ali Gogiew and twelve companions, Mudar Gurfow and one companion, and Mill Mumukoff and four companions.

After carefully considering the evidence presented in the records, the Acting Secretary has affirmed the excluding decision of the board in each case and directed that the twenty aliens involved be deported.

(Sd.) F. H. LARNED,
Acting Commissioner-General.

Inc. No. 8379.
C. T. H.

41 *Traverse to Return to Writ of Habeas Corpus.*

United States District Court, Southern District of New York.

THE PEOPLE OF THE UNITED STATES ex Rel. ALI GEGIOW et al.,
Relators,
against
BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York, Respondent.

The relators above named, by Barnett & Jablow, their attorneys, traversing the return herein, allege as follows:

1. They deny that the examinations of said aliens before the

Boards of Special Inquiry on the 7th day of February, 1914, and on the 10th day of February, 1914, in the matter of the application of their admission into the United States, showed or tended to show that they were persons who were likely to become public charges for any of the reasons set forth in the return herein, and allege that there was absolutely no evidence whatever adduced at such examinations showing or tending to show that these relators were persons likely to become public charges for any of the reasons specified in the Immigration Laws, or that they were members of any of the excluded classes mentioned therein.

2. They deny that they were duly or in accordance with law excluded from admission into the United States, and ordered
42 deported to the country whence they came, and allege that their exclusion was illegal, unlawful, invalid and contrary to law.

3. They deny that the action of the Secretary of Labor, in affirming the excluding decisions of the Boards of Special Inquiry, was in accordance with or warranted by the law, and allege that such action on the part of the said Secretary of Labor was illegal, unlawful, invalid and contrary to law.

4. Upon information and belief, they deny that the reports of industrial conditions in Portland, Oregon, show that it would be impossible for these aliens to obtain employment, or that the industrial conditions there are such as to render it impossible for these aliens to obtain employment.

5. They deny that they are being deported to the country whence they came, in conformity with the laws of the United States of America, in such case made and provided, and allege that their deportation is illegal, unlawful, invalid and contrary to law.

Wherefore, these relators demand that the return herein be dismissed, and that the writ of habeas corpus sued out herein be sustained, and the said relators be released from custody.

BARNETT & JABLOW,
Attorneys for Relators.

Office & P. O. Address, No. 149 Broadway, Borough of Manhattan, City of New York.

43 *Opinion.*

United States District Court, Southern District of New York.

UNITED STATES ex Rel. ALI GEGIOW and Others
v.
BYRON H. UHL, Acting Commissioner of Immigration.

This is a habeas corpus proceeding brought on behalf of several aliens who have been denied admission.

LACOMBE, *C. J.:*

There is apparently no irregularity in the proceedings. The immigrants were examined, were brought before the Board of Special

Inquiry and interrogated. After an adverse decision, their appeals came duly before the Secretary of Labor, who affirmed the conclusion of the Board that they were liable to become a public charge. The Act of 1907, Sec. 25 expressly provides that the decision of the proper immigration officers, if adverse to the admission of an alien, shall be final unless reversed by appeal to the Secretary of Labor. It is abundantly settled by decisions that it was the intent of Congress to leave the determination of the question to the Board and the Secretary, not to the courts. These immigrants are apparently unskilled laborers, speaking no language except their own, unintelligible to other Russians, have very little money; there is no one in this country legally liable to support any of them. The Board had opportunity on physical inspection to form conclusions as to their capacity to earn a living. Opinions might differ as to whether or not they were, at the time the question arose as to their admission, liable to become a charge upon the public. The personal equation of each alien and the condition- which confront him are elements of the problem. Of Section 8 of the Immigration Act of 1891 (and the provisions of Section 25 of the existing Acts are substantially the same, except that it substitutes a Board of Special Inquiry for a single inspector), the Supreme Court has said:

"The Statute does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land. The provision—merely empowers inspectors to administer oaths and to take and consider testimony, and requires only testimony so taken to be entered of record."

See Nishimuru Ekin v. U. S., 142 U. S., 651, an authoratitive decision expressed in unambiguous language, which seems to be frequently overlooked.

Whether an alien shall or shall not be admitted to this country is a political question which Congress may dispose of as it chooses. This statute confides the determination of that question, in the first instance to administrative officers, who are not confined, as courts are, to a particular method of informing themselves as to the facts. To provide for the correction of any erroneous conclusions of these officers there may be a review in each case, on the request of the alien, by another officer holding a high political station—a cabinet officer. The Act in no uncertain language provides that, when its procedure has been conformed to, his decision as to the fact shall be final and conclusive. To construe that language so as to destroy such finality would seem to be legislation rather than construction.

The writ is dismissed.

For the relators, Barnett & Jablow.

For the Government, H. Snowden Marshall, U. S. attorney.

45 *Order Dismissing Writ of Habeas Corpus.*

At a Stated Term of the United States District Court for the Southern District of New York, Held in the U. S. Court House and Post Office Building, Borough of Manhattan, City of New York, on the 3rd Day of March, 1914.

Present: Hon. E. Henry Lacombe, Circuit Judge.

UNITED STATES ex Rel. ALI GEGIOW, TAMISCH SCHERIBOW, SABAS Zarikoew, Afago Atzkapokk, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozakoff, Sachid Panneshew, Mudar Gurfow, Dyko Gazaff, Geranduka Tabuchow, Zulkarney Mukosoff, Chasir Charsinow, and Aschid Gurfow

vs.

BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York.

A writ of habeas corpus having been issued in the above entitled matter to inquire into the detention of the relators by the respondent, and the said writ of habeas corpus having come on to be heard before the Honorable E. Henry Lacombe, Circuit Judge, and after hearing Morris Jablow, Esq., attorney for the relators, in support of said writ, and Harold A. Content, Assistant United States Attorney, attorney for the respondent, in opposition thereto, and due deliberation having been had,

46 Now, on motion of H. Snowden Marshall, United States Attorney, attorney for the respondent, it is hereby

Ordered, that the writ of habeas corpus herein be, and the same hereby is, dismissed, and that the relators be remanded to the custody of respondent.

Enter,

E. H. LACOMBE,
U. S. Circuit Judge.

Assignment of Errors.

United States District Court, Southern District of New York.

THE PEOPLE OF THE UNITED STATES ex Rel. ALI GEGIEW, TANICH Scheribow, Sabas Zarikoew, Afago Atzkapok, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozakoff, Sachid Pannesshew, Mudar Gurfow, Dyko Gazaff, Gerandika Tabuchow, Zulkarney Mukosoff, Chasir Charsinow, Ashit Guruhoff, Aliens,

against

BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York.

Afterwards, to wit, on the 4th day of March, 1914, in this
47 same term, before the Honorable Judges of the United States Circuit Court of Appeals, for the Second Judicial Circuit, in the Borough of Manhattan, City of New York, come the above named Ali Gegiew, Tanich Scheribow, Sabas Zarikoew, Afago Atz-

kapok, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozakoff, Sachid Pannesshew, Mudar Gurfow, Dyko Gazaff, Gerandika Tabuchow, Zulkarney Mukosoff, Chasir Charsinow, and Ashit Guruhoff, relators herein, by their attorneys, Barnett & Jablow, and say that in the record and proceedings aforesaid, there is manifest error in this, to wit:

The Court erred in dismissing the writ of habeas corpus herein.

The Court erred in holding that the hearings granted to said relators by the Boards of Special Inquiry at Ellis Island, New York Harbor, on February 7th, 1914, and February 10th, 1914, were a full and fair hearing within the intent and meaning of the Immigration Law.

The Court erred in failing to hold that there was no evidence in the record sustaining or tending to sustain the finding of said Board of Special Inquiry that the relators herein were likely to become a public charge.

The Court erred in holding that there was any evidence in the record sustaining or tending to sustain the finding of said Board of Special Inquiry that the relators herein were likely to become a public charge.

The Court erred in holding that these relators were likely to become a public charge.

The Court erred in holding that there was no irregularity on the part of the Government officials in this proceeding.

The Court erred in holding that there was no jurisdiction vested in the Courts to review the action of the Secretary of Labor in excluding an alien from admission into this country.

48 The Court erred in holding that the decision of the Secretary of Labor as to a fact necessary for a finding of exclusion is final and conclusive, and that the question of whether there is any evidence of such a fact in the record cannot be inquired into by the Court on a writ of habeas corpus.

The Court erred in holding that these aliens come within one of the excluded classes specified in the Immigration Laws.

The Court erred in holding that the Immigration officials and the Secretary of Commerce and Labor acted within the authority vested in them by the Immigration Laws.

For other errors appearing upon the record.

Whereas, by the law of the land, the said writ of habeas corpus should have been sustained and said relators discharged from custody.

And Ali Gegiew, Tanich Scheribow, Sabas Zarikoew, Afago Atzkapok, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozaoff, Sachid Pannesshew, Mudar Gurfow, Dyko Gazaff, Gerandika Tabuchow, Zulkarney Mukosoff, Chasir Charsinow and Ashit Guruhoff, the relators herein, pray that the order and judgment aforesaid may be reversed, annulled and held for naught, and for such other relief as may be proper in the premises.

BARNETT & JABLOW,
Attorneys for Relators.

Office and Post Office Address, No. 149 Broadway, Borough of Manhattan, City of New York.

49 *Petition for and Order Allowing Appeal.*

United States District Court, Southern District of New York.

THE PEOPLE OF THE UNITED STATES ex Rel. ALI GEGIEW, TANICH Scheribow, Sabas Zarikoew, Afago Atzkapok, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozakoff, Sachid Pannesshew, Mudar Gurfow, Dyko Gazaff, Gerandika Tabuchow, Zulkarney Mukosoff, Chasir Charsinow, Ashit Guruhoff, Aliens,

against

BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York.

The above named Ali Gegiew, Tanich Scheribow, Sabas Zarikoew, Afago Atzkapok, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozakoff, Sachid Pannesshew, Mudar Gurfow, Dyko Gazaff, Gerandika Tabuchow, Zulkarney Mukosoff, Chasir Charsinow and Ashit Guruhoff, relators herein, feeling aggrieved by the order and judgment made and entered on the 3rd day of March, 1914, in the above entitled proceeding, do hereby appeal from said order and judgment to the United States Circuit Court of Appeals, for the Second Judicial Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and pray that this appeal may be
50 allowed, and that a transcript of the record, proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals, for the Second Judicial Circuit.

Dated, New York, March 4th, 1914.

BARNETT & JABLOW,
Attorneys for Relators.

Office and Post Office Address, No. 149 Broadway, Borough of Manhattan, City of New York.

And now, to wit, on the 5th day of March, 1914, it is
Ordered, that the foregoing appeal be allowed as prayed for.

E. HENRY LACOMBE,
United States Circuit Judge.

Citation.

By the Honorable E. Henry Lacombe, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to Byron H. Uhl, Acting Commissioner of Immigration at the Port of New York, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 16th day of March,

1914, pursuant to an appeal on file and an assignment of
51 errors filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein a writ of habeas corpus sued out by Ali Gegiow and others was dismissed, and wherein you were the respondent; and you are required to show cause, if any they be, why the order in said proceeding mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 5th day of March, in the year of our Lord One thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-eighth.

E. HENRY LACOMBE,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

52 *Stipulation.*

United States District Court, Southern District of New York.

THE PEOPLE OF THE UNITED STATES ex Rel. ALI GEGIOW et al., Relators,
against
BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York, Respondent.

It is hereby stipulated and agreed that the record on appeal herein shall consist of the following:

1. Writ of habeas corpus.
2. Petition for writ of habeas corpus.
3. Return of Acting Commissioner of Immigration together with all exhibits.
4. Relators' traverse to return.
5. Opinion of Judge Lacombe.
6. Order dismissing writ of habeas corpus.
7. Petition for appeal and allowance of appeal.
8. Assignment of errors.
9. Citation.

It is also hereby stipulated and agreed that the appellants may have up to and including the 16th day of March, 1914, to make and file the transcript of the record on appeal herein in the Circuit Court of Appeals, Second Circuit.

53 And it is hereby further stipulated and agreed that the foregoing printed pages are a true transcript of the record of the United States District Court in the above entitled proceeding as agreed upon between the parties, and may be so certified by the clerk of the said United States District Court, for the Southern District of New York.

New York, March 12th, 1914.

BARNETT & JABLOW,
Attorneys for Relators.
H. SNOWDEN MARSHALL,
U. S. Attorney, Attorney for Respondent.

54 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE PEOPLE OF THE UNITED STATES ex Rel. ALI GEGIOW et al., Relators,
against
BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York, Respondent.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 12th day of March, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the said United States the one hundred and thirty-eighth.

[L. S.] ALEX. GILCHRIST, JR., *Clerk.*

55 United States Circuit Court of Appeals for the Second Circuit.
October Term, 1913.

No. 290.

Argued April 21, 1914; Decided May 14, 1914.

UNITED STATES ex Rel. ALI GEGIOW, TAMISCH SCHERIBOW, SABAS Zarikoew, Afago Atzkapokk, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozakoff, Sachid Panneshew, Mudar Gurfow, Dyko Gazaef, Geranduka Tabuchow, Zulkarney Mukosoff, Chasir Charsinow, and Aschid Gurfow,
against
BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York.

Appeal from the District Court of the United States for the Southern District of New York.

Before Coxe, Ward, and Rogers, Circuit Judges.

On appeal from an order of the District Court for the Southern District of New York dated March 3rd, 1914, dismissing a writ of habeas corpus and remanding the relators to the custody of the respondent. The Immigration officials having found that the relators were liable to become public charges they were excluded and ordered deported.

Ralph Barnett and Morris Jablow, for Appellants.

H. Snowden Marshall, United States Attorney for the Southern District of New York, and Harold A. Content, Assistant U. S. Attorney for Appellee.

56 COXE, *J.:*

The sole question presented by this appeal is whether there was any evidence to sustain the finding of the immigration officials that each of these aliens is liable to become a public charge. The law provides that the decision of the appropriate immigration officers, if adverse to the admission of the alien, shall be final unless reversed on appeal to the Secretary of the Department of Labor (Sec. 25 of the Act of Feb. 20, 1908). In the case at bar the decision of the Board of Special Inquiry was affirmed by the Secretary of the Department of Labor.

In U. S. ex rel. Rosen v. Williams, 200 Fed. Rep. 538, 541, the leading authorities were reviewed by this court and the conclusion was reached that we considered the action of the immigration officers final in every case where there was any evidence to support it. In the nature of the case these inquiries must be swift and summary. The formality of court proceedings cannot be had and is not expected where, in many cases, witnesses cannot be produced for examination and cross-examination. The members of these boards have, however, the great advantage of seeing the immigrant and determining from personal observation and examination his fitness to enter the country. It is plain from a reading of the law that degenerates or those so constituted mentally, physically or morally that they may be a burden upon or a menace to society, are not wanted here. In the case at bar no one of the immigrants can speak our language or any language that is understood in this country. Even the Russian interpreters employed by the Department could not understand them. They all come from a remote province of Russia and have no one here under legal obligation to support them. They know no trade and only one can read or write in his own language. They were all ticketed through to Portland, Oregon, and had sums aggregating slightly more than twenty-five dollars each. They were not employed and no actual promise of employment had been given them. On the contrary, the immigration officers had ascertained by published reports and inquiries that owing to depressed labor conditions, the prospect of an unskilled laborer obtaining work was most unfavorable. In such circumstances, how long after reaching
57 Portland would it — before these immigrants became public charges? As soon as the $25 (only one in the party having as much as $51) is exhausted, what is to support them? What is to prevent them from being thrown upon the charity of the town? It is true that they may succeed in obtaining work, but it is, to say the least, equally true, that they may not do so. It is the latter contingency which makes them undesirable aliens. Certainly we cannot find that the decision of the Board, that they are likely to become public charges, has no evidence to support it; on the contrary, the conclusion seems to follow directly from the facts. We do not assert that all of this evidence would be admissible in a court of law or equity; it is not necessary that it should be. No immigration act could be enforced which required all these facts to be established with the same formality and certainty which is required in the

courts. The Board had an apportunity to see the relators and to determine by personal observation what manner of men they were. The Board knew that they were unable to speak any language known in this country, that only one could read or write, that when the small sums in their possession were exhausted they would starve unless assisted and that there was no one here under any legal obligation to assist them. The Board was also enabled from information derived from the press and other sources to determine the likelihood of the relators securing employment when they reached Portland and they were justified in finding that conditions there were such that the chance of employment was most unlikely. It is true that information in this form would not be permitted in a court of law, but the immigration officers cannot delay these proceedings indefinitely. They cannot summon witnesses from the Pacific states or send commissions there. If they were satisfied from information received that there was no market in Portland for such services as these relators could render, they were justified in acting upon such information, just as they would be if satisfied from reports in the press or from any reliable source that Portland had been destroyed by flood or fire or that an epidemic of cholera was raging there. Congress has placed the determination of these questions in the hands of trained officials and their conclusions upon disputed questions of fact are final and conclusive. It is only in the very rare instance that a finding is without any proof to support it that the courts may interfere.

58 We think these views are sustained by the following authorities:

Nishimura Ekiu v. U. S., 142 U. S. 651;
Lee Lung v. Patterson, 186 U. S. 168;
Lem Moon Sing v. U. S., 158 U. S. 538;
U. S. v. Ju Toy, 198 U. S. 253;
Low Wah Suey v. Backus, 225 U. S., 460.

The order dismissing the writ is affirmed.

59 United States Circuit Court of Appeals for the Second Circuit, October Term, 1913.

No. 290.

Argued April 21, 1914; Decided May 14, 1914.

UNITED STATES ex Rel. ALI GEGIOW, TAMISCH SCHERIBOW, SABAS Zarikoew, Afago Atzkapokk, Dowkin Zarikoew, Sarakinn Wendugew, Tuta Tawkozakoff, Sachid Panneshew, Mudar Gurfow, Dyko Gazaef, Geranduka Tabuchow, Zulkarney Mukosoff, Chasir Charsinow, and Aschid Gurfow

against

BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York.

Appeal from the District Court of the United States for the Southern District of New York.

Before Coxe, Ward, and Rogers, Circuit Judges.

WARD, *Circuit Judge* (dissenting):

Every alien not within the classes excluded by the Act of 1907 has a right to enter this country and also has a right to the writ of habeas corpus to test whether his detention is lawful, but not whether the finding of the administrative officers is erroneous in point of fact. It is the law of this district that there must be some evidence to support the finding of the Board, Rosen v. Williams, 200 Fed. Rep. 538. I think it is also the law of the Supreme Court because Mr. Justice Pitney said as to an objection, that there was no evidence to support the order made by the Board in Zakonite v. Wolf, 226 U. S. 272, 274:

60 "As to the first point an examination of the evidence upon which the order of deportation was based convinces us that it was adequate to support the Secretary's conclusion of fact. That being so and the appellant having had a fair hearing, the finding is not subject to review by the courts."

The aliens were all young and healthy, were provided with transportation to Portland, Oregon, each having at least $25 cash and fellow countrymen at the point of destination. The ground upon which the Board excluded them was because it was inclined to believe from reports of industrial conditions in Portland that they would not obtain employment at this season. The Board does not state whether the reports were oral or written, when they were made, who made them, whether the person or persons making them were qualified to express an opinion, or finally, what the reports were.

Section 25 of the Act of 1907 provides, inter alia:

"All hearings before Boards shall be separate and apart from the public, but the said boards shall keep a complete, permanent record

of their proceedings and of all such testimony as may be produced before them."

Then it goes on to provide an appeal for the alien to the Secretary of Labor which shall stay proceedings "until the receipt by the Commissioner of Immigration at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the Board of Special Inquiry."

Unless the alien gets this review from the Secretary he has not had a fair hearing, but how could the Secretary possibly review this opinion of the Board when he was absolutely without any evidence as to what the opinion depended upon? Of course the reports in question need not be proved in accordance with legal rules, but they should at least be so stated that the Secretary can review them. The case of Tang Tun v. Edsell, 223 U. S. 673 shows how merely hearsay evidence was obtained and included in the record. I think there was no evidence whatever to support the order and that the aliens should be discharged.

61 At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms in the Post Office Building in the City of New York, on the 25th day of May, one thousand nine hundred and fourteen.

Present:

Hon. Alfred G. Coxe, Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges.

UNITED STATES ex Rel. ALI GEIGOW et al., Appellants,
vs.
BYRON H. UHL, Acting Commissioner, etc., Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. C. C.

62 Endorsed: United States Circuit Court of Appeals, Second Circuit. U. S. ex rel. Geigow et al. vs. B. H. Uhl. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 22, 1914. William Parkin, Clerk.

63 United States Circuit Court of Appeals for the Second Circuit.

THE PEOPLE OF THE UNITED STATES ex Rel. ALI GEIGOW et al.,
Appellants,
against
BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York, Appellee.

It is hereby stipulated, consented and agreed that the petition of the relators for a rehearing and their application to certify certain questions to the United States Supreme Court be omitted from the printed record herein, and the printing thereof dispensed with, the same having been submitted to and passed upon by the United States Circuit Court of Appeals, for the Second Circuit, and denied in all respects by them; and that only the order of said Court denying said motion of the relators for a rehearing and their application to certify said questions be included in said printed record, and that this stipulation be made a part of said printed record herein, in lieu of said petition.

Dated, New York, November 30, 1914.

BARNETT & JABLOW,
Attorneys for Relators, Appellants.
H. SNOWDEN MARSHALL,
U. S. Attorney, Attorney for Respondent.

Endorsed: U. S. ex rel. Geigow vs. Uhl. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 1, 1914. William Parkin, Clerk.

64 At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the court rooms in the Post Office Building, City of New York, on the 15th day of October, 1914.

Present:

Hon. Alfred C. Coxe, Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges.

UNITED STATES ex Rel. ALI GEIGOW et al., Appellants,
vs.
BYRON H. UHL, Acting Commissioner, etc., Appellee.

A petition for a rehearing having been filed herein by counsel for the appellants;

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

H. W. R.

Endorsed: United States Circuit Court of Appeals, Second Circuit. U. S. ex rel. Geigow vs. B. H. Uhl. Order. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 15, 1914. William Parkin, Clerk.

65 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 64 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States ex rel. Ali Geigow et al., Appellants, against Byron H. Uhl, Acting Commissioner, etc., Appellee, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of December in the year of our Lord One Thousand Nine Hundred and fourteen and of the Independence of the said United States the One Hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, canceled 12/3/14. W. P., Cl'k.]

66 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which The People of the United States ex Rel. Ali Gegiow et al., are appellants, and Byron H. Uhl, Acting Commissioner of Immigration at the Port of New York, is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Su-
67 preme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the tenth day of March, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

68 [Endorsed:] File No. 24545. Supreme Court of the United States, October Term, 1914. No. 801. Ali Gegiow et al., Petitoners, vs. Byron H. Uhl, Acting Commissioner, etc. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 12, 1915. William Parkin, Clerk.

69 United States Circuit Court of Appeals for the Second Circuit.

THE PEOPLE OF THE UNITED STATES ex Rel. ALI GEGIOW et al., Appellants,
against
BYRON H. UHL, Acting Commissioner of Immigration at the Port of New York, Appellee.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the certified ttranscript of record in this case now on file with the Clerk of the U. S. Supreme Court, be considered as return to the writ of certiorarri granted herein.
Dated, New York, March 12th, 1915.

BARNETT & JABLOW,
Attorneys for Appellants.
H. SNOWDEN MARSHALL,
Attorney for Appellee,
United States Attorney, Southern District of New York.

Endorsed: U. S. ex Rel. Geigow vs. Uhl. Stiipulation. United States Circuit Court of Appeals, Second Circuit.. Filed Mar. 12, 1915. William Parkin, Clerk.

70 To the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mentiion is within made having lately been certified and filed in the office of the clerk of said court, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issueed herein.
Dated, New York, March 12th, 1915.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 3/12/15. W. P.]

71 [Endorsed:] 801/24545. United States Circuit Court of Appeals, Second Circuit. United States ex Rel. Ali Geigow et al., v. Byron H. Uhl. Return to Certiorari.

72 [Endorsed:] File No. 24545. Supreme Court U. S., October Term, 1914. Term No. 801. Ali Gegio et al., Petitioners, vs. Byron H. Uhl, Acting Commissioner, etc. Writ of Certiorari and Return. Filed March 13, 1915.

SEP 14 1925

SUPREME COURT OF THE UNITED STATES

No. 340

ALI GEGIOW and SABAS ZARIKOEW,

Petitioners,

vs.

BYRON H. UHL, as Acting Commissioner of Immigration at the Port of New York,

Respondent.

Brief for Petitioners.

MAX J. KOHLER,
ARNAV S. BACON,
RALPH BARNETT,
MORRIS HAMBURG,
Of Counsel.

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Supreme Court of the United States

ALI GEGIOW and SABAS ZARIKOEW, Petitioners, vs. BYRON H. UHL, as Acting Commissioner of Immigration at the Port of New York, Respondent.	No. 340.

BRIEF FOR PETITIONERS.

This is a hearing on a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted by this Court on March 10th, 1915 (fols. 66-7) for the purpose of reviewing before this Court the proceedings of said Court (215 F. R., 573 C. C. A), in affirming an order and decree of the United States District Court for the Southern District of New York, made by Judge Lacombe (Transcript of Record, fols. 45-6), dismissing a writ of habeas corpus herein, and remanding the two petitioners (and twelve others) to the custody of respondent for exclusion and deportation from the United States (Transcript, fol 61), Judge Ward dissenting (fols. 59-61), from the decision of Judges Coxe and Rogers (fols. 55-8). The case is of great importance, and involves the rights of thousands of immigrants, it being the first case reported which has involved the right of the immigration authorities to assume controverted facts, without proof, on the

theory of judicial notice, they here relating to supposed industrial conditions, as bearing on the probability of immigrants becoming public charges under the Immigration Laws, and after assuming such facts to exist (which even courts could not notice judicially, in view of their ever varying, uncertain, complicated, and indefinite character and remoteness as to place of occurrence), to deport otherwise admissible aliens on the strength of them, when even the intention of noticing such facts judicially was not called to the attention of the aliens, and they were thereby deprived of an opportunity even of meeting them by proof, and when the aliens in fact contended in court that such facts did not in truth exist. There are no limits to administrative authority to exclude aliens, by thus assuming unproven and controverted facts, if this determination will be permitted to stand. It also involves the proposition, urged by Judge Lacombe in the District Court (fols. 43-4), that the Courts are powerless to review a decision excluding an immigrant, even for the purpose of ascertaining whether there is *any* evidence to sustain exclusion, though the great weight of authority is to the contrary.

Statement of Facts.

The two petitioners above named, together with a number of others, twenty in all, fourteen of whom joined in said habeas corpus proceedings, arrived at the port of New York, by the Steamship "Czar" of the Russian-American Line on February 5th, 1914, from Ansorowo, Caucasia, in the southeastern section of European Russia, all bound to Portland, Oregon (fols. 3, *et seq.*). Only the two petitioners applied for the writ of certiorari, the others having all been deported, and the facts concerning them being different. Petitioner Ali Gegiow (fols. 14-

16), is twenty-one years of age, comes from Ansorowo, Russia, is in good health, single, able to read and write, paid his own passage out of his own money and is a farm laborer by occupation, and was never in the United States before. He testified without contradiction, that he was going to an uncle, living at Portland, who has been there three years. Said relator had $40.00 in money on landing, and a railroad ticket to Portland. He testified that his uncle wrote to him about two months previously, mentioning that he is doing well, digging ditches at Portland, and informing him that he would support him, if necessary, till he secured work, and would find work for him, but he had not secured any work for him before landing (and of course could not lawfully do so, in view of our Contract Labor Laws) (fols. 14-16).

Appellant Sabas Zzrikoew is similarly situated, except that he cannot read or write, and stated that he was going merely to a friend in Portland ready to help him; he had $25.00 in cash (fols. 20-1). (All these facts were uncontradicted and undisputed.)

In excluding them the Board of Special Inquiry said (fol. 26):

> "The board is unanimous in the opinion that these aliens are persons likely to become a public charge for the following among other reasons: They arrive here with very little money, and *in view of the recent employment reports of industrial conditions at Portland and vicinity*, the board believes it would be impossible for them to obtain employment at manual labor. The money in their possession is insufficient to meet their requirements until such time as they might hope to obtain employment. They have no one here legally obligated to assist them in case of need. Two of the aliens (other than these two relators) have wives and dependent families in their native country. If admitted, there is a likelihood

of their becoming a public charge. Excluded and ordered deported."

All of the relators are Russian Ossetes or Kabardinians (fols. 14, 27, 32, 39), and were personally before the Board of Special Inquiry, and were seen by the members of the Board and examined by them through an interpreter, with Ali Gegiow as intermediary interpreter, as the others spoke a dialect unfamiliar to the Government interpreters (Respondent reports, fol. 38); but no notation of any physical, medical or mental defect was made on the records, or was justified, all being young, strong and in excellent health, except in the case of six aliens who were not parties to the habeas corpus proceedings, nor did the Government physicians certify to any defects (fols. 27-8, compare fol. 38).

No testimony, publication or report, concerning the alleged labor conditions at Portland, Oregon, or vicinity, was received in evidence before the Board of Special Inquiry, nor was any referred to in its examination of the two appellants. The alien, Sabas Zarikeow, was not notified until the decision of his case, by the Board of Special Inquiry, that the Board proposed to take notice of said alleged conditions. Some of the other aliens, other than the petitioners, were later vaguely so apprised (fols. 17, 18, 26, 31, 37), and petitioner Ali Gegiow (who speaks Russian also), *after* his case was first heard, acted as interpreter, between these aliens and the Government interpreter but he was not notified of an intention to consider said unproven facts, in the determination of his own case. In a letter to the Immigration Bureau, transmitting the records on the appeals (fol. 28), respondent acting commissioner reported *that the information in question was contained "in the daily press of recent date,"* and is to the effect that "industrial conditions in the northwest, especially in the vicinity of Portland, Oregon, are very bad," but no newspaper or other pub-

lication concerning said alleged industrial conditions was produced at the hearing, nor accompanied the record on the appeal to the Secretary of Labor, nor was it further referred to, nor was any offered in evidence in the District Court, nor specifically identified there as a basis for judicial notice, though relators' petition and traverse specifically denied that reports of industrial conditions were as alleged or render it impossible for relators to obtain employment (fols. 4, 5, 6, 41-2).

Relators in their petition for the issuance of the writ of habeas corpus in the United States District Court for the Southern District of New York, alleged that they were debarred from landing by orders of exclusion, under the circumstances set forth, which they contended established a violation of due process of law under the United States Constitution and the Immigration law, and the orders were without any evidence to support them (fols. 4, 5, 6), and after their exclusion by the Board of Special Inquiry as aliens likely to become a public charge under the Immigration Laws, they had concededly appealed to the Secretary of Labor, but the appeal was dismissed (fols. 4, 9-10, 12-13, 40). Respondent attached to his return to the writ (fols. 14 *et seq.*) the testimony taken by said Board of Special Inquiry as to all fourteen relators, who had joined in one petition for habeas corpus. This confusing joinder of the fourteen cases in one record led to some confusion and mistake in considering the facts in the decision in the Circuit Court of Appeals.

On the 14th day of May, 1914, the Circuit Court of Appeals filed opinions, and an order affirming the said order of the District Court, Judge Ward dissenting (fols. 55-61). Afterwards, on the 11th day of June, 1914, two of the appellants-petitioners, Ali Gegiow and Sabas Zarikoew, made a motion for a

rehearing of the appeal as regards them, and also requested that certain questions of law arising in the cause should be certified to this Court for its determination, but these motions were denied October 15th, 1914 (fols. 63-4). The contentions here made were advanced fully on behalf of petitioners below. The petitions for rehearing and for this writ of certiorari were and are submitted only on behalf of the two petitioners named, who are out on bail with the consent of the Government.

Questions Involved.

In the Circuit Court of Appeals on the petition for rehearing, counsel for the Government joined with counsel for petitioners in phrasing questions of law arising, applicable to the relators, as follows:

(1) Where an alien is excluded by a Board of Special Inquiry as being a member of the classes excluded by the Immigration Act, and the excluding decision was affirmed by the Secretary of Labor, if a fair, though summary hearing was not denied to the alien, is the action of the immigration authorities reviewable by the United States District Court in habeas corpus proceedings to determine whether there was *any* evidence to justify the finding of the executive authorities?

(2) When an alien is excluded by the immigration authorities on the ground that he is likely to become a public charge, and the Board of Special Inquiry, in passing upon his case, considered alleged newspaper reports as to many people being out of employment in the distant locality to which the alien is bound, as indicating that he was not likely to obtain work there, which newspaper was not identified, produced nor verified at the hearing, nor made a part of the record

of the proceedings on appeal to the Secretary of Labor, nor any testimony as to said alleged conditions was given, are the rights of the alien immigrant violated under the fifth amendment of the Federal Constitution, forbidding deprivation of liberty or property without due process of law, or under Section 25 of the Immigration Act of February 20, 1907, requiring the Boards of Special Inquiry to "keep a complete permanent record of their proceedings, and of all such *testimony* as may be produced before them," and requiring the Secretary on appeal to determine applications to enter "solely upon the evidence adduced before the Board of Special Inquiry."

(3) Are the rights of the alien violated under the facts assumed in question No. 2, where the Board of Special Inquiry did not apprise the alien, until after his rejection, that it intended to take into account in deciding his case, such alleged economic conditions?

Also (4) the further question arises as to the right of immigration authorities to consider alleged industrial conditions in the place to which the alien is bound, in their supposed relations to the aliens' likelihood to become a public charge.

Concerning the first of these questions, petitioners of course do not concede that they were accorded "a fair, though summary hearing," and the second and third questions suggested above, in fact, affirmatively indicate that a denial of due process of law and even of the forms of a legal hearing, are involved. The question is whether the act of an administrative board, in noticing facts judicially without proof, which it is urged it has no right to notice judicially, and assuming them to be true, contrary to the actual facts, is no violation of "fairness and due process of law"; also, whether such board can notice such facts judicially,

which are capable of being rebutted by evidence, without even announcing, before the close of the hearing, its intention to assume such facts, so as to enable the alien to introduce proof in opposition. As Prof. Thayer well said in his work on Evidence (p. 309) as to judicial notice: "This function is indeed a delicate one; if it is too loosely or ignorantly exercised, it may annul the principles of evidence and even of substantive law." (a) But, viewing the question for the moment merely, as one involving the right on habeas corpus, to review an excluding decision under the immigration laws, if the Federal Court determines that there is *no* evidence to justify the exclusion, we find that in the present case, Judge Lacombe, in the District Court, denied such authority (fols. 43-4), while Judge Ward on the appeal expressly affirmed it, in the light of this Court's decisions (fols. 59-60), and the majority of the Circuit Court of Appeals, though in this respect agreeing with Judge Ward, held that there was here *some* evidence justifying exclusion, particularly in the light of the matter noticed judicially without proof by the immigration authorities (fols. 56-7).

(b) Immigrants are, of course, entitled under the 5th amendment to the Federal Constitution, and under the Immigration Law, as well as commonly under our treaties with foreign countries, to due process of law and to a fair and orderly hearing in the determination of their applications to enter. *Such uncertain, complex, every-varying facts, changing constantly in point of time, and differing at the same time as to different lines of industry, and relating to a distant place, as labor conditions in their relation to a particular person's being able to get employment in his specialty or any other line, cannot be noticed judicially by the Courts, even, much less, by badly edu-*

cated and weak Immigration Inspectors, drawing only $1,800 per annum salary, whose incompetency has just been emphasized by the national Immigration Commission.

Alleged newspaper reports, not even produced or identified, are not proper sources upon which to predicate judicial notice of facts, particularly where the facts are controverted, and even their alleged publication in the newspapers is controverted, and the case differs materially from important well-known occurrences which everybody knows, like the San Francisco earthquake, or the raging of cholera, referred to in Judge Coxe's opinion below (fol. 57). It was incumbent upon respondent to have adduced at least the alleged newspaper reports in question, whose existence was controverted by the traverse to the petition (fol. 42,) not merely because of the rule requiring a party to produce evidence peculiarly within his own possession (*Selma R. Co. vs. U. S.*, 139 U. S., 560, 567; *Peo. vs. Nyce*, 34 Hun, 298) but also under the procedure applicable to allegations in petition and traverse not met by the return, in habeas corpus proceedings (*Kohl vs. Lehlback*, 160 U. S., 293, 296).

(c) *Even as to matters that may be noticed judicially, orderly procedure and due process of law require a request in the course of the trial, to notice them judicially, and announcement of intention to do so, especially as regards controvertible matter, so that the adverse party may know what he has to meet and can adduce evidence to meet it.*

(d) *It should also be noticed that neither of the petitioners was questioned by the inspectors as to what resources, other than the money shown the immigration authorities, he had, either here or abroad, so that there is no right to assume that they could not have secured additional cash, if desired, from their own resources.*

(e) Petitioners, Ossetes and Kabardinians, come from the southeastern section of European Russia, in the neighborhood of the Caucasus Mountains, and have an Aryan language and literature of their own, and are a vigorous and chiefly agricultural people (Ency. Britannica, 11th Ed., V. Article, "Caucasia," especially pp. 546, 548; also I, 469; "Kabardia" XV, 619, XXIII, 874 and VIII, 197; *Immigration Commission Reports*, Vol. 5, pp. 33-8, 102. *Efrom Brockhaus'* Russian Encyclopedia, Vol. 22, p. 263). In fact Dr. K. S. Kennard, while a government physician at Ellis Island, wrote a scientific paper on "The Racial Derivation of the Ossetes," in 1907, doubtless induced to do so by his examination of a group of seven Ossetes on arriving at Ellis Island three years previously, whose fine physique he comments on (American Anthropologist, Vol. 9, pp. 276-86, 650-2), so that it is apparent that they have been migrating here for some years, though in numbers only for about the last three years, with Oregon as their nucleus of settlement. It is interesting to note in Special Immigrant Inspector W. W. Husband's report on his special investigation of "Russian Peasant Immigration" in the Annual Report of the Commissioner General of Immigration for the year ending June 30, 1914 (p. 391, at pp. 399-402), that the department deems such new "Russian Peasant Immigration" one which "it would seem wise that every effort be made to utilize * * * in a way that will be most advantageous to the United States," and that "they are accustomed to agricultural labor under adverse circumstances, which kind of labor would seem to be required in the development of much of the so-called waste land in the United States."

(f) Of course, the fact that the cases of two groups of these immigrants (fols. 31, 37), decided by the Board some days after those of these two petitioners

(fol. 26), were included in the same return to the writ of habeas corpus [redacted], does not make the proceedings in these later cases applicable to petitioners (though similar), and in fact, even the circumstance that the Board of Special Inquiry improperly decided some eleven cases together, after trying each separately, including those of the two petitioners (fols. 14-27), does not affect any immigrant by the evidence taken in the cases of the others, though such course was improper and unauthorized, and led to confusion everywhere (Compare Toy Tong vs. U. S., 146 F. R., 343, 344, C. C. A.; Brown vs. Spofford, 95 U. S., 474; Moore vs. Forsanth Co., 38 S. C., 319, 326; Ferrett vs. Atwell, 1 Blatchf., 151; Davis vs. St. Louis R. Co., 25 F. R., 786.

Some Incidental Comments on the C. C. A. Opinion.

The circumstances that records covering fourteen different aliens were jumbled together in one return, and that the immigration authorities and the courts attempted, as seen, to take judicial notice of controverted, ever-varying, industrial conditions, are responsible for a number of erroneous statements of fact, unwarranted as to these two petitioners, in the opinion of the majority of the Circuit Court of Appeals. It was there erroneously assumed (a) that petitioners know no trade (fol. 56); (b) speak no language understood in this country (fol. 56), and (c) that unfavorable industrial conditions made it unlikely that they would find employment here (fols. 56, 57), there being, (d) no one here legally obligated to support them (fol. 56). (a) In fact, however, it is established and is undisputed that both of the petitioners are farm laborers (fols. 15, 20). In fact, farm laborers are so badly wanted here, and are such a crying need,

and particularly in the sparsely settled west, whither these men were bound, and where they are now working, that the Government itself, though the "Information Division," in the Bureau of Immigration, established under Sec. 40 of the Immigration Act, quickly finds positions for them, and Secretary Nagel publicly advocated exempting farm laborers from our Contract Labor Laws, so that more would come over (see printed Report of Commissioner General of Immigration for year ending June 30, 1914, containing report of Mr. Powderly as Chief of the Information Division [pp. 159-186, especially 172-4], and "Proceedings of the Conference of State Immigration, Land and Labor Officials with representatives of the Division of Information, Bureau of Immigration, Nov. 16th and 17th, 1911," published by the department as a public document under the title "Distribution of Admitted Aliens and other Residents," especially pages 26-7). Secretary Wilson has taken a similar stand with regard to distributing farm laborers, as has also Commissioner General Camminetti.

(b) As to petitioners' supposed inability to speak or write any language spoken here, petitioner Ali Gegiow is the very one whom Judge Coxe later expressly excepted (fol. 57), as he is conversant with Russian, and even aided the Government interpreters in interpreting for the other aliens (fols. 14, 28). Moreover, in view of the testimony that Ali Gegiow was going to an uncle at Portland, with whom he was in correspondence, and who had promised to help him in finding work (fol. 15), and similar connections of blood or race on the part of the other relator, it is obvious that Judge Coxe's statement is at least an exaggeration, to the effect that "no one of the immigrants can speak * * * any language that is understood in this country" (fol. 56). In fact, as stated in respondent's letters of

recommendation to the secretary, which accompanied these records on the appeal, petitioners are "Russian (Ossetin) Kabardinians" (fols. 27, 14; compare fols. 32, 39). Instead of making erroneous assumptions of fact regarding this race, the Court should know, as shown by the immigration records, that a couple of thousand of these Ossetes have migrated to the United States during the past few years, making Portland, Oregon, their headquarters, and working in that vicinity as farm laborers, and have freely conversed in that vicinity with each other, and liberally aided each other, and succeeded in their new homes. (See *ante*, p. 10.)

The fact that Portland has been the nucleus for this whole migration was overlooked by respondent in his letter of transmittal of some of the appeals, other than petitioners,' and he accordingly suggested that from this common destination he suspected that these aliens were coming over together in violation of the contract labor laws, while conceding that the evidence did not establish this suspicion (fol. 39), as also that the Board of Special Inquiry did not exclude for any such reason (fol. 31).

So also, if any one should be so rash as to suggest that unfamiliarity with English is apt to tend to make an immigrant a public charge, such assumption might readily be thrust aside, if only in view of the fact, stated by Prof. Wm. Z. Ripley, in writing, on "Races in the United States" (Atlantic Monthly, Dec., 1908, p. 745), on the authority of George Bancroft's History (Vol. VII, p. 335), that already at the time of the Revolution "one-fifth of our population could not speak English and that one-half at least was not Anglo-Saxon by descent," as compared with 1,217,280 over ten years of age of our foreign-born population unable to speak English in 1900, or 12.2%, and 15.6% in 1890 (Imm. Comm. Reports, I, p. 160). Of course, an overwhelming majority of the immigrants com-

ing over now do not speak our vernacular, but eagerly avail themselves of ever-increasing opportunities for learning it here.

(c) *The fact is that these aliens are far better equipped to succeed economically here than the overwhelming majority of aliens daily admitted.* The average amount of money in the possession of immigrants on landing during the fiscal year 1913, was only $34 per person, about 151,000 having had $50 or more, as against 755,000 having less than $50 (Report of Comm. General for 1913, pp. 7, 46, 47; Report for 1914 is similar, pp. 29, 43); the Immigration Commission reported that during the period 1904-1910, only 13.9% of the immigrants admitted showed $50 or more, and that the average amount shown between 1899-1910 was only $21.57 (Reports, Vol-I, p. 103). In fact, though Congress in 1906 considered the propriety of establishing a $25 cash requirement for immigrants, even that was eliminated by the House Committee (House Report, No. 4912, dated June 11, 1906), and in the Conference Committee, and the Act of 1907, as passed, accordingly omitted the same. It is thus obvious that petitioners had appreciably *more* than the average amount of money, and none dependent on them. On the other hand the total number of persons deported during the fiscal year 1913, as having become public charges within three years after entry was only 1,262, and the total number deported for all causes was 2,019, out of an average immigration per annum for the three years involved of 971,550 (Report Comm. General for 1913, pp. 110, 111, 105), or about one-fifth of one per cent, an utterly negligible quantity. The Immigration Commission so found (Reports, I, pp. 35-6). The explanation is to be found in the fact that nearly all the immigrants are destined to join relatives or friends here, who help them in finding work and to get along

in their new surroundings; thus, out of the 1,197,892 immigrants admitted during the fiscal year 1913, there were 954,931 going to join relatives, 179,920 joining friends, and only 63,041 going to neither relatives nor friends (Commissioner's Report, pp. 46, 47; similar in 1914, p. 43). The assistance of relatives and friends in their new homes is worth immeasurably more than a few dollars or hundreds of dollars more, and comparatively few immigrants join relatives legally obligated to support them here, as the sex and age statistics further show. The trouble is that erroneous views have recently arisen at Ellis Island, as to the *negligible* character of offers of assistance to aliens, when coming from persons not legally obligated to assist the aliens. This view is inconsistent with the able opinion of Judge Brown in *In re Day*, 27 Fed. Rep., 678, 681, which was recently adopted as authoritative by the Department of Commerce and Labor in an able opinion, and the lower court was misled by the emphasis placed by the immigration authorities on the necessity for an obligatory character for proffers of assistance of relatives and friends (Record, fol. 26), thus *ignoring* the important and generous assistance of those under no legal obligation. (See also *post* p. 46).

The majority opinion below emphasizes the fact that hearings in immigration cases must "be swift and summary," and that "the formality of court proceedings cannot be required" (fol. 56). In fact, the Court says (fol. 57): "No immigration act could be enforced which requires all these facts to be established with the same formality and certainty which is required in the courts," and that "information in this form" of the industrial conditions which were noticed without proof "would not be permitted in a court of law, but the immigration officers cannot delay these proceedings indefinitely. They cannot summon witnesses from the Pacific states or send commissions

there." That all formal judicial requirements with regard to trials and modes of proof do not apply to administrative tribunals has, of course, been repeatedly held by the courts, but it is submitted that, while the admission of incompetent testimony may not justify a reversal, this cannot be the excuse for dispensing with requiring some competent, necessary sworn testimony, nor for disregarding even the fundamental principles inhering in due process of law in administrative hearings, such as opportunity to acquire knowledge of the evidence and production of the reports relied upon and opportunity to meet the same. The immigration authorities have gotten along very well for many years without resorting to such attempts to assume without proofs, controverted facts—of which even courts cannot take judicial notice—and of even concealing their intention to assume the same from the immigrant, thus depriving him of an opportunity of meeting the controverted matter in question. The immigration laws have been construed ever more rigidly despite the increasing number of exclusions abroad before embarkation, and there is no need whatsoever for assuming, as the lower court did, that boards of special inquiry must be permitted, in order to perform their duties, to assume unsworn, unproven, controverted facts, such as even courts may not notice judicially.

So also, apparently, the majority opinion below (fol. 56), in emphasizing the fact that these aliens were "not employed and no actual promise of employment had been given them," overlooks the fact that such arrangements are forbidden by our contract labor laws, so that this is the situation in which all admissible immigrants find themselves on arrival. In view of the facts hereinbefore pointed out, showing the experiences of the overwhelming majority of immigrants coming over here, who are much less favor-

ably situated than these petitioners, the inquiry in the opinion below as to how long these immigrants could probably exist after reaching Portland before becoming public charges, should under all probabilities be answered "all their lifetime," in view of the factors ignored by the Court, instead of justifying an inference of probability at an early date of becoming public charges.

POINT I.

Alien immigrants are entitled to due process of law under the Federal Constitution (5th Amendment), and under Sec. 25 of the Immigration Law, and generally under our treaties with foreign countries, and a denial of due process of law arises from a denial of a proper hearing, and undisclosed assumption of controverted facts and denial of opportunity to meet them, and grave irregularities on the hearing of the appeal thereon, as also where there is no competent evidence whatsoever justifying an exclusion.

(I) *(1) The right to due process of law under the 5th Amendment in immigration cases is of course well established, and, as further urged hereafter, this forbids unlawfully assuming facts, not cognizable on the*

theory of judicial notice, and also deciding a case on such undisclosed facts without giving the immigrant notice of such intention or an opportunity to meet such matter by proof.

Chin Yow vs. U. S., 208 U. S., 8.
The Japanese Immigrant Case, 189 U. S., 86, 100.
In re Con Pon, 168 F. R., 479, C. C. A. (*post*, pp. 27-8).
Davies vs. Manolis, 179 F. R., 818 (C. C. A.)
U. S. vs. Sibray, 178 F. R., 144, 149.
Hanges vs. Whitfield, 209 F. R., 675; aff., 222 F. R., 745.
Rodgers vs. U. S., 152 F. R., 346, C. C. A.
In re Monaco, 86 F. R., 117.
In re Gottfried, 86 F. R., 9.
Roux vs. Commissioner, 203 F. R., 413.
Ex p. Petkos, 212 F. R., 275; Mod., 214 F. R., 978.
In re Kornmehl, 87 F. R., 314 (Illegal Regulations).
In re Ung King Teng, 213 F. R., 119.
Ex p. Wong Tuey Hing, 213 F. R., 112.

See also:

Interstate Comm. Comm. vs. L. & N. R. R. Co., 227 U. S., 88, 91, 93 (quoted pp. 60-2).
U. S. vs. 1500 Bales of Cotton, 27 F. C., 15958.
Thayer on Evidence, pp. 309-10.

The right to due process of law, as applied to an alien's right to enter and remain, was specifically recognized already in Magna Charta, which provided (Ch. 30):

> "*All foreign merchants* (mercatores), (if they were not openly prohibited before) *shall have their safe and sure conduct* to depart out of England, *to come into England, to tarry in and go through England*, as well by land as by water, to buy and sell without any manner of evil tolls, by the old rightful customs, except in time of war."

Of course in those days, there were not apt to be any but "merchants," coming into England from abroad, so that the provision was intended to apply to all foreigners, and in fact Hale says in his "Pleas of the Crown" (I., p. 93, Am. Edition of 1847):

> "The statute speaks indeed of *mercatores*, but under that name all foreigners living or trading here are comprised."

Our treaties with England and Italy (Treaties in Force in 1898, pp. 216, 310), for instance, assure due process on applications of their subjects to enter.

Said this Court in the leading case of *The Japanese Immigrant Case*, 189 U. S., 86, 100-101:

> *"But this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law,' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect to the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.* Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon

> the questions involving his right to be and remain in the United States. *No such arbitrary power can exist where the principles involved in due process of law are recognized.*
>
> "This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. *In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution.* An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellant."

It will be observed that this Court was called upon in that case to pass on the constitutional restraints imposed upon such immigration hearings, because the deportation statutes there involved (quoted there page 96) contained no procedure clause. Yet, in order to render the Act constitutional, provisions for a hearing and opportunity to defend were implied, and this case, involving one concededly an alien, therefore recognized the inherent constitutional restraints upon immigration tribunals. *In our case, we are dealing, moreover, with the express provisions of Sec. 25, of the Act of 1907, providing:*

> *"All hearings before boards shall be separate and apart from the public but the said boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them...Such decision (on appeal to the Secretary) shall be rendered solely upon the evidence adduced before the board of special inquiry."*

In *Chin Yow vs. U. S.*, 208 U. S., 8, this Court held that constitutional right and due process of law were violated, even in a Chinese case, where the inspector refused to take the competent testimony offered by the immigrant, and the Court took jurisdiction to redress the wrong alleged, by which

> "*petitioner arbitrarily was denied such a hearing and such an opportunity to prove his right to enter the country as the statute meant that he should have.* If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. * * * But supposing that it could be shown to the satisfaction of the District Judge that the petitioner had been allowed nothing but the semblance of a hearing. * * * The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form."

The violation of this constitutional right was the basis there for the direct appeal from the District Court to the Supreme Court.

See also *Whitfield vs. Hanges*, 222 F. R., 745, C. C. A, quoted *post*, pages 52-5, and Interstate Com. Com. vs. L. & N. R. R., 227 U. S., 83, quoted *post*, pages 60-2, as to denial of constitutional due process of law in administrative hearings through making orders based, in part, on *ex parte* and undisclosed investigations of facts.

In *Davies vs. Manolis*, 179 F. R., 818 (C. C. A., 7th C.), appellant was proceeded against for deportation, and after the hearing was closed, other additional evidence was taken in his absence and without notice to him, and the Secretary ordered deportation. Said the Circuit Court of Appeals:

> "*Whatever were the subsequent proceedings or conclusions in the department, they were*

> *ex parte, and the* final orders for re-arrest *were without hearing* and *unauthorized.* In such case the petitioner-appellee was entitled to a writ of *habeas corpus,* as he was arbitrarily denied such hearing and such opportunity to prove his right to enter this country as the statute meant that he should have (*Chin Yow vs. U. S.,* 208 U. S., 8)."

In *Hanges vs. Whitfield,* 209 F. R., 675, deportation proceedings were reviewed, where the inspector refused to recall for cross-examination, witnesses under his control whose testimony the Government had previously taken *ex parte,* and when some were produced by relator, they refused to testify, unless he requested them to, which he declined to do. This was held to be a denial of due process of law, the Court saying:

> "The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact; and it is indispensable in all judicial proceedings in this country, civil or criminal, that *ex parte testimony, even though given under the solemnity of a legal oath or affirmation that it is true, taken in the absence of and without opportunity at some stage of the proceedings to the party against whom it is proposed to be used to cross-examine the witnesses giving such testimony, cannot rightly be used against him* (1 Greenl. Ev. [16th Ed.], Sec. 447; 2 Wigmore on Ev., Secs., 1361, 1365; Interstate Commerce Commission vs. Louisville & N. R. Co., 227 U. S., 88, 93; 33 Sup. Ct., 185; 57 L. Ed., 431). * * *
>
> "*They were thus prevented from obtaining their testimony* either upon direct or cross-examination. True, the petitioners and their counsel were permitted to examine the record, or copy of the testimony taken by the inspector prior to the application for the warrant of ar-

rest; but of what avail was that? *That testimony had already been forwarded to the Bureau of Immigration, and an inspection of the record kept by the Inspector would only enable them to read what he had written, without opportunity to test its truthfulness by legitimate cross-examination or otherwise. That such testimony is legally admissible in any proceeding in which it is sought to deprive a person, citizen, or alien of his personal or property rights, cannot be successfully maintained.* * * *

"The Immigration Act and the rules prescribed thereunder evince the purpose to afford an alien a fair opportunity to test the truth of the evidence adduced against him, and to disprove it, if he can legally do so. If rule 22, properly interpreted, denies the aliens this right, then it is one not authorized by the Immigration Act. * * *

"Any action of the inspector which results in the denial to the alien of a substantial right to which he is lawfully entitled is unauthorized and cannot rightfully be upheld.

"The conclusion is unavoidable, under the testimony in this case, that the hearing before the Inspector (who acted as prosecutor and judge upon such hearing), has not the semblance of a fair hearing."

This holding was just affirmed in 222 F. R., 745, C. C. A., quoted *post*, pages 52-5.

In *Rodgers vs. U. S.*, 152 F. R., 346 (C. C. A., 3rd Circ.), in considering alleged irregularities on the part of the Board of Special Inquiry, as authorizing judicial review by means of *habeas*, of an application to enter, the Court held that even the failure of the board's record to show that the immigrant was advised of his right to appeal to the Secretary, before a regulation affirmatively required such notice to be given, authorized judicial review. The Court said that the record

> *"nowhere discloses, expressly or by implication, that Buchsbaum was informed that he had a right of appeal from the decision of the board. If he had been so informed, it would have been the duty of the board to cause the fact to be entered of record in the minutes of the board's proceedings.* The action of the authorities in thus sending Buchsbaum from the port of Boston without informing him of his right of appeal was irregular and unlawful. Practically and in legal contemplation it impaired or deprived him of that right. * * * The withholding of such right from the alien of itself precludes finality in the decision."

In line with this, Judge Lacombe held in *In re Monaco*, 86 F. R., 117, that an office rule of the department, preventing forwarding the papers on appeal to the secretary, required judicial review of the application to enter, and in *In re Gottfried*, 89 F. R., 9, Judge Butler held that a decision on appeal against the immigrant, rendered on the appeal of a dissenting member of the board without notice to the immigrant is a nullity, saying:

> *"If the petitioner had been given notice, and an opportunity to defend, the situation would be materially different. As it is, his right to be heard by the bureau has been disregarded.* That the decision of the board should have been reversed on the representations of a dissenting member, and the order issued without notice to the petitioner is, to say the least, astonishing." *Habeas* entertained.

In *In re Gin Fung*, 89 F. R., 153, the Court said:

> *"But can it be said that there has been a hearing or a decision?* On the 8th day of July, the collector heard the evidence of one witness, a white man, to the effect that the petitioner was a merchant, and as such, entitled to land. He heard no evidence contradicting this statement. *He offered no rea-*

sonable opportunity to the petitioner to prove his case, or to produce further testimony."

Even efforts of Inspectors to dissuade the immigrant from securing counsel, require judicial review:

U. S. vs. Williams, 185 F. R., 598 (Holt, J.).
Roux vs. Commissioner, 203 F. R., 413 (C. C. A., 9th C.).

In *U. S. vs. Wong Chung,* 92 F. R., 141, Coxe, J., said, in a case where defendant was excluded because the collector heard from some undisclosed source at some undisclosed time, that defendant, who claimed to be a merchant's son, was going to a laundry:

> "The action of the collector was based upon an irrelevant rumor. It would be a misnomer to call it hearsay evidence, it was no evidence at all. * * * It was conjecture only. It was the merest shadow, not the shadow of anything tangible, but 'such stuff as dreams are made of.' No man whose brain is in normal condition would regulate the most trivial affairs of life upon such information.
>
> "No witness was sworn, no statement was reduced to writing, no written decision was made and, no reason for his action was ever given by the collector to the *defendant,* who *had no opportunity to answer or explain the rumor regarding his destination.* * * * In every reported case where the decision has been upheld, some semblance of legal procedure has been observed. The courts should not, unless the language of the law is too plain to admit of doubt, throw down every barrier which the rules of the common law have erected against the encroachment of arbitrary power."

See accordingly:

In re Chinese Relator, 58 F. R., 554, Lacombe, J.

See also the able opinion of Morton, J., in

E.r. p. Petkos, 212 Fed. Rep., 275, quoted *post*, pages 50-1; mod., 214 F. R., 978, C. C. A., on other point.

(2) *It will be observed that all the cases relied upon by the Government below herein and cited in* the opinion of the Circuit Court of Appeals(fol. 58), (other than the *Nishimura Ekiu case*, 142 U. S., 651, which arose under a materially different law, and will be considered *post*, pages 31-7), *arose under the Chinese Exclusion Laws, and not under the general immigration laws. The Courts have strongly emphasized the fact that differences in the statutes render these two classes of cases inapplicable to each other, for an entirely different procedure is established by the Chinese Exclusion Laws, than is prescribed by the section of the Immigration Law* (Sec. 25), *here involved* (*Rodgers vs. U. S.*, 152 F. R., 346, 352, C. C. A.; *Gonzales vs. Williams*, 192 U. S., 1, 16). The Chinese Exclusion Laws establish no quasi-judicial board, like the Board of Special Inquiry, and were drawn on the theory that, in general, governmental certificates were to be exclusive methods of proof, and in terms threw the burden of proof on the Chinese persons, while, on the other hand, there is no such provision as in our Immigration Law, requiring the appeals to the Secretary to be heard solely on the testimony taken before the Board of Special Inquiry, and this conversely involves a right to offer new evidence on behalf of the immigrant in Chinese cases on the appeal (*U. S. vs. Sing Tuck*, 194 U. S., 161, 170). The consequence is that due process of law in Chinese cases, unlike cases of applications of immigrants in general to enter, need not necessarily require the introduction of the evidence in defendant's presence, with right to cross-examine the witnesses, for when thereafter the appeal is taken, there is a right to adduce new evidence, after seeing the full record be-

low, while in immigration cases under the general law, the appeal is expressly limited to *the evidence* adduced before the *quasi-judicial tribunal*, called a "board of special inquiry."

As was already indicated, the statutory procedure for deportation of aliens, after admission, under our general immigration laws, does not provide for a board to take testimony either, being more closely approximated to the Chinese Exclusion Law machinery, so that authorities thereunder have only a limited applicability to hearings before the boards of special inquiry. Even under the looser procedure applicable to Chinese Exclusion cases, however, such departure from "due process of law" as is here involved, has been held to authorize judicial review. Said the Circuit Court of Appeals in *In re Con Pon*, 168 F. R., 479 (9th Circ.), (which decision reversed the exclusion, where as here a material document was not forwarded to the secretary, or even identified, on the appeal, which the inspector had considered):

> *"But the applicant upon his appeal from the decision of the local officer was entitled to the benefit of all the material evidence which was before the inspector. To withhold any thereof, and to exclude it from the record on the appeal, was to deny him the right of appeal which the statute gives him.* The testimony of a witness which was on the whole favorable to the applicant's contention was by inadvertence omitted from the record on the appeal, and was not considered on the hearing thereof. It makes no difference that such evidence was taken at the instance of the inspector, and that it never came to the attention of the applicant or his counsel; it was a portion of the evidence taken by the inspector as an officer of the government, whose duty it was to act impartially and to ascertain the truth as to the question at

> issue. The inspector discredited it, but the *applicant was entitled to the benefit of it on the appeal.* It is no answer to this to say that portions of the testimony of that witness tended to contradict certain statements of Look Wing. Having been denied the benefit of all the testimony taken upon the question of his right of admission to the United States, *the applicant has been deprived of the right of appeal which the statute confers upon him,* and he may, therefore, under *habeas corpus,* test the legality of his imprisonment. *In re Monaco* (C. C.), 86 Fed., 177; *United States vs. Wong Chung* (D. C.), 92 Fed., 141; *United States vs. Chin Fee* (D. C.), 94 Fed., 828; *Rodgers vs. United States,* 152 Fed., 346, 91 C. C. A., 454; *United States vs. Nakashima,* 160 Fed., 942, 87 C. C. A., 646."

The case of Tang Tung vs. Edsell, 223 U. S., 673, relied upon by the government and cited in the opinion below, also arose under the Chinese Exclusion Laws, and therefore involved no such hearing before a Board of Special Inquiry, as is provided for in Section 25, nor the limitation of that section that the appeal must be heard exclusively upon the evidence taken before the Board. This Court recognized in it, however (page 675), that

> *"if it does not affirmatively appear that the executive officers have acted in some unlawful or improper way and abused their discretion,* their finding upon the question of citizenship must be deemed to be conclusive and is not subject to review by the courts."

The chief question there involved was whether applicant had been admitted previously to the United States on an earlier trip, as alleged by him, or had been then rejected (p. 675, *et seq.*). In the course of the application, the Chinese inspector examined the official records on file to ascertain whether appli-

cant had then been rejected or admitted, and on finding that they disclosed a rejection, "the inspector properly brought this fact to the latter's attention, and asked whether he had any explanation to give" (p. 677). In connection with this inquiry, the inspector examined the official custom house files as to the arrival and sailing of vessels, and the procedure as to examining Chinese applicants at that time, and "the point of the inquiry" was disclosed on the examination of applicant's witnesses to his attorney (p. 679). Other records of Chinese persons who accompanied Tang Tung on the same steamer were also examined, to show a conflict between them and the official records, as to an endorsement of alleged admission. The Court held that the Secretary "might at all times take cognizance" of his official files (p. 681), which is merely in line with the rule applicable to Courts that on such an issue as that, *they may take judicial notice of their own files* (de Bearn vs. Safe Deposit Co., 233 U. S., 24, 32), and is no extension of the judicial rule as to judicial notice. Instead of treating the rule of judicial notice as one that might authorize taking judicial notice of papers, not even produced or identified, and withholding information of such intention until the case was closed, this Court shows that applicant had notice of this proof before the papers on appeal were submitted (pp. 679-680), and that even in the *habeas corpus* proceedings, relator did not claim that these reports were false or misleading, but stipulated that the case should be heard on the prior record, and it added (p. 680):

> "Had there been ground for saying that the inspector had misled the secretary by misrepresenting the records to which he referred, or by false assertions as to the matters of fact disclosed by the inquiries, it cannot be doubted that this would have been shown, as there was

> abundant time for full consideration and inquiry."

In our case, on the contrary, the petition in *habeas* proceedings averred that there was no evidence as to likelihood to become a public charge (fols. 4, 5, 6), and the traverse expressly denied that reports of industrial conditions were as alleged, and that the conditions were as alleged (fol. 42), and under the rules as to *habeas*, under the Federal statute (Rev. St., Sec. 754), these facts were therefore admitted by respondent, in default of proof of their correctness (Kohl vs. Lehlbach, 160 U. S., 293, 296), even apart from the rule that the burden is on a party even in a criminal case to produce evidence peculiarly within his own power (Selma R. Co. vs. U. S., 139, U. S., 560, 567; Peo. vs. Nyce, 34 Hun, 298).

That this Court did not intend to decide that the administrative officers may take judicial notice of material documents, not produced or even identified, further appears from the fact that, in the Chinese deportation case decided by it soon after, *Low Wah Suey vs. Backus*, 225 U. S., 460, 471, (also cited), it disregarded a similar objection, *solely* because the record failed to show the nature or materiality of the report claimed to have been withheld, saying:

> "It is further alleged that the executive officer acted in bad faith, and arbitrarily in receiving a report based on hearsay information, the name of the informer being withheld from Li A. Sim and no opportunity being given her to offset or disprove such hearsay evidence. *The nature and character of this testimony is not set forth*, and *we have no means of knowing it was not such as might properly have been considered in such a hearing.*"

The Government itself relied upon the Con Pon case in that case (p. 463), which this Court thus ap-

proved, but distinguished, and which had been decided in the lower courts simultaneously with the Tan Tung case (161 F. R., 618; on appeal, 168 F. R., 478, 488).

It is important to notice that this Court in that case, recognized as a ground for entertaining *habeas* proceedings in immigration cases (225 U. S., p. 468),

> *"that the action of the executive officers was such as to prevent a fair investigation."*

See also the later decision in *Int. Comm. Com. vs. L. & N. R. Co.*, quoted *post*, pp. 60-2, in which these earlier immigration case were reviewed on this point The other Chinese cases cited below (fol. 58) are also thus distinguishable.

(3) *The decision of the Court in Nishimura Ekiu vs. U. S.*, 142 U. S., 651, relied upon so much below, particularly by Judge Lacombe (fol. 44), is not now applicable, in view (a) of the marked changes in the statute since that case was decided, creating a *quasi-judicial board* required to take *testimony*, and in the direction of conferring on the physicians, and not the lay inspectors, sole jurisdiction to note and certify physical, as well as mental, defects in immigrants (*U. S. vs. Petkos*, 214 F. R., 978, C. C. A.); (b) the later decisions of this Court limiting it, especially *The Japanese Immigrant Case*, 189 U. S., 36, where it was distinguished on constitutional grounds; (c) the fact that here *unlawful procedure*, and no mere question of existence of facts, is involved; (d) because despite our statute, the record here fails to show that relators were excluded on account of anything observed by the inspectors in their appearance; and (e) because the right since established, of determining finally even rights to citizenship and other difficult questions of law and fact under the later acts in these administrative proceedings, requires closer conformity to judicial procedure as necessary "due process of law." It should also be noted that, (f) in

general immigration cases, the statute imposes the burden of proof on the Government, while in Chinese cases it is on the alien, except in the single instance of "assisted immigrants," under the general immigration laws, in which case Section 2 *expressly* throws it on the alien (26 Opinions, *Attorneys General*, 410, 414; *U. S. ex rel. Castro vs. Williams*, 203 F. R., 155, 156, Ward J.; *Rodgers vs. U. S.*, 152 F. R., 346, 352, C. C. A. See also *post*, pp. 46-7, and *Chin Bak Kan vs. U. S.*, 186 U. S., 193, 200).

(a) Material changes in the law were made by Congress since the Nishimura Ekiu case was decided, especially by the present act (Section 25), as to procedure, as contrasted with Section 8 of the Act of 1891, involved and quoted in the *Nishimura Ekiu* case. *No board, and no "hearing" before any board,* were provided for in the earlier act, no provisions for "a complete record of their proceedings and of all such *testimony* as may be produced before them," and no provision that the decision on the appeal "shall be rendered solely upon the evidence adduced before the board" (Section 25 of Act of February 20, 1907. As to definition of *"hearing,"* see Int. Comm. Com. vs. L. & N. quoted *post*, pp. 61-2.

Judge Lacombe, in the District Court herein (fol. 44), in claiming for boards of special inquiry authority "on physical inspection," to exclude aliens on the basis of their "conclusions as to their (alien) capacity to earn a living," apparently on grounds not disclosed by their records, applied the decision of this Court in the Nishimura Ekiu case, on the assumption that Sec. 8 of the Immigration Act of 1891 there involved is "substantially the same," as Sec. 25 of the subsisting Act, "except that it (the latter) substitutes a Board of Special Inquiry for a single inspector, * * * an authoritative opinion expressed in unambiguous language which seems to be fre-

quently overlooked." But the learned Judge overlooked the fact that the Immigration Law has been radically amended since 1891, not merely in the important respect of substituting a board for a single inspector, but particularly in inserting a provision requiring a regular "hearing" and providing for an appeal to the Secretary "to be heard solely on the evidence before the Board of Special Inquiry" (Section 25 of the present Act), while on the other hand, the jurisdiction of the medical officers was enlarged so as to include discovery and certification of all *physical* and mental defects, including those bearing on likelihood to become a public charge, instead of having the inspectors pass on such questions. The Act of 1891, quoted in full in the Nishimura Ekiu case, provided merely that the immigration officials were to *"inspect* all such aliens" and "the power to administer oaths and to take and consider testimony * * * all of which shall be entered of record," was held not to require inspectors to take any testimony at all, but merely to *"empower* inspectors to administer oaths and to take and consider testimony, and requires only testimony so taken to be entered of record." This was radically different than the present provision (Sec. 25 of the Act of 1907), providing a *"hearing"* before a *"board of special inquiry,"* of three persons, required to keep a complete permanent record of their proceedings and of *all such testimony as may be produced before them,"* coupled with the further provision that the appeal to the Secretary thereby authorized *"shall be rendered solely upon the evidence adduced before the board of special inquiry,"* which has repeatedly been construed, as seen, as requiring an administrative "hearing" at which all evidence relied upon shall be taken down and the complete record transmitted on the appeal to the Secretary. The single "inspecting" official now holds all persons for examination before the

board of special inquiry, who do not appear to him to be clearly and beyond a doubt, entitled to land. Nor is the change merely a verbal one. As seen, in 1891, the duty of the immigration officers was merely to "inspect" aliens, with purely permissive power to take evidence under oath, and this duty to *inspect* included consideration of apparent physical disabilities of aliens. Since then, the provision that the *"medical* examination shall be made by surgeons of the Marine Hospital Service" (Sec. 8, Act of 1891), was enlarged by Sec. 17 of the Act of March 3, 1903 (32 Stat. 1213, carried over into Sec. 17 of the present Act of 1907), requiring a "*physical* and mental examination of all arriving aliens by medical officers of the U. S. Marine Hospital Service" * * * who shall certify for the information of the immigration officers and the boards of special inquiry * * * *any and all physical and mental defects or diseases observed,"* and their medical certificates are made final by Sec. 10 on boards of special inquiry, not merely as to "loathsome or dangerous contagious diseases, but as to "any mental or *physical disability* which would bring such aliens *within any of the* classes excluded from admission," including *"likelihood to become a public charge"* (see U. S. vs. Rodgers, 182 F. R., 274; aff., 185 F. R., 334, C. C. A.).

So, also, since the Act of 1891 was passed, various other acts were passed, establishing an appropriate procedure for winnowing out the physically defective immigrants, through the action of others than the immigrant inspectors or boards of special inquiry. The Act of March 3rd, 1893 (27 Stat., 569), required masters and steamship surgeons to investigate and report, under oath, as part of the ship's manifest, before embarkation abroad, as to the ship's surgeons' "physical examination" of the immigants carried, including their belief that "no one of said passengers is

likely to become a public charge." Secs. 12, 13 and 14 of the Act of March 3, 1903 (and of the present Act of 1907), required the steamship company surgeons to make such examination, to be both "physical and oral," and to include a report on the alien's "condition of health, mental and physical." Moreover, as to loathsome and dangerous contagious diseases, and the like, the steamship companies are to be heavily penalized by administrative order by Sec. 9 of this Act (and of the Act of 1907), for bringing over persons, whose "disease might have been detected by means of a competent medical examination at the time of embarkation," a provision sustained by this Court in Ocean Nav. Co. vs. Stranahan, 214 U. S., 320, and which the Immigration Commission reports leads to the exclusion of at least four times as many aliens abroad who have actually purchased tickets for the United States, as are excluded here (Vol. I, p. 195 of Immigration Commission Reports). It is thus obvious that what was a mere "inspection" of aliens by single inspector under the Act of 1891, as regards physical and general considerations regarding admissibility, has become divided under the present act, into a physical and mental examination by surgeons on the one hand, and on the other, a *"hearing"* before a *"board of special inquiry"* of three Inspectors, who must keep "complete permanent *records of their proceedings*, and of all such *testimony* as may be produced before them," in such shape that the Secretary's decision on appeal "shall be rendered solely upon the evidence adduced before the board of special inquiry," and at which all the evidence relied upon must be adduced and noted down, with opportunity to the alien to meet and rebut the same.

In *U. S. vs. Petkos*, 214 F. R., 978, C. C. A., the Circuit Court of Appeals for the First Circuit said

succinctly, as to boards of special inquiry excluding aliens for physical defects, not certified by the government physicians:

> "Under Section 2 of the Immigration Act as amended March 26th, 1910 (36 Stat., 263), the second of these findings ('being afflicted with a physical defect which will affect his ability to earn a living') could have been made only upon a *certificate to that effect by the examining surgeon.* There was no such certificate then before the examining board." See also quotations from that case below, *post,* pp. 50-1.

Sec. 17 of the Immigration Law now expressly requires the medical officers to make the physical and mental examinations and certify them to the immigration officers.

(b) and (c) Reference is made to the later decisions of the Courts cited, inconsistent with the view that because the board of special inquiry might, conceivably, exclude an immigrant on his appearance alone—this can make their decision non-reviewable, where it appears that they decided the case without such statement on a different assigned ground or under a wrong procedure.

(d) As pointed out by the C. C. A. of the Third Circuit in *Rodgers vs. U. S.*, 152 F. R., 346, quoted *ante,* pages 23-4, the record of the Board of Special Inquiry must affirmatively disclose matters relied upon by the Board, to warrant exclusion, otherwise the defect will be regarded as non-existent.

In Ex. p. Petkos, 212 F. R., 275, the Court distinguished the *Nishimura Ekiu* case in this very respect, stating:

> "There was here no conflict of evidence, as in the cases cited for the respondent; *nor did*

> *the inspectors base their action on the appearance of the immigrant, as in Nishimura Ekiu vs. U. S.*"

Ex. p. Gregory, 210 F. R., 680, 682, is to the same effect. Compare Ark Foo vs. U. S., 128 F. R., 697, 698, C. C. A., and U. S. vs. Lee Chung, 206 F. R., 367. This also renders irrelevant Judge Coxe's suggestion below (fol. 57), that "the board had an opportunity to see the relator and determine by personal observation what manner of men they were."

(e) Obviously, the Secretary on the appeal provided by the Act, cannot review the case intelligently if reliance may be placed on matters not noted on the record. Accordingly Rule 17, Subd. 7 of the Department Rules expressly provides:

> "The *complete* appeal record shall be forwarded promptly to the bureau with the views in writing of the immigration officer in charge."

See further as to this Point II, *post*, pp

(II) (a) *There being no competent proof whatever in the record of the alleged employment conditions in Portland, nor of the alleged inability of petitioners to speak any dialect except their own unfamiliar one, or of other disability likely to affect ability to earn a living, their exclusion on the ground of likelihood to become a public charge is without any evidence, and is reviewable in the Courts on habeas corpus, even independently of the errors of procedure involved.*

Since this case was argued below, this Court once more clearly recognized the duty to review the record to ascertain if there was *any* evidence warranting deportation, in the case of *Lewis vs. Frick*, 233 U. S., 291, 297-300, supplementing the authority of *Zakonite vs. Wolf*, 226 U. S., 272, 274, quoted in the dissenting opinion of Judge Ward herein (fol. 59).

In several of the cases cited *ante*, it was held that incompetent testimony must be disregarded, though it is doubtless true that all the rules of civil and criminal trials need not be followed by such boards, the scope *of review being limited to ascertaining whether* there is *any* competent evidence, familiar in *habeas corpus* proceedings, to review trials before justices of the peace often not lawyers, or on certiorari, to review administrative hearings, like trials of policemen, conducted by laymen, and in reviewing administrative hearings, like those before the Interstate Commerce Commission.

Bryant vs. U. S., 167 U. S., 104.
People ex rel. Board of Police Commissioners, 155 N. Y., 40.
Int. Comm. Com. vs. L. & N. R., 227 U. S., 88, quoted *post*, pp. 60-2.

In all those cases it was held that the admission of merely incompetent testimony does not require a reversal, thus meeting the argument of the Court below (fols. 56-7), but the rule is, of course, settled that there must be *some* competent evidence to justify the result. *As regards the new claim of Boards of Special Inquiry to a right to take judicial notice of such matters, this is a novel and dangerous new assumption of power and the rights of the Government have been adequately protected all these years without such exercise.* In any event, the proof should be produced in definite form, even if it might be *ex parte*, and be sworn to, without requiring sending for witnesses to the Coast. (See *ante*, pp. 15-16).

White vs. Gregory, 213 F. R., 768, C. C. A., reversing 210 F. R., 680, involved no question as to method of proving the alleged industrial conditions there relied on, nor were they there controverted, and that seems to be the first case carried to the courts in which

labor conditions were considered, and the District Court had deemed even this unauthorized and illegal. while in *Healy vs. Backus,* they were formally proved. (See *post,* pp. 70-73).

It has been repeatedly held, and is recognized in the majority opinion of the lower Court, also, that *the record before the board may be examined, to see if there was any competent evidence justifying exclusion on the ground of likelihood to become a public charge, and there is none in the absence of proof of affirmative disabilities.*

U. S. ex rel. Klein vs. Williams, 206 F. R., 460, 461 (C. C. A.), approving 189 F. R., 915, Holt, J.
U. S. ex rel. Rosen vs. Williams, 200 F. R., 538, 541-2 (C. C. A.)
U. S. ex rel. Bauder vs. Uhl, 211 F. R., 628, 632 (C. C. A., Rogers, J.).
U. S. ex rel. Goldenberg vs. Williams, 204 F. R., 828, Noyes, J.
Ex parte Petkos, 212 F. R., 275, modified in 214 F. R., 978.
In re Feinkopf, 47 F. R., 447.
In re Cummings, 32 F. R., 75.
Ex parte Saraceno, 182 F. R., 955, Ward J.
Frick vs. Lewis, 195 F. R., 693 (C. C. A., 6th C.).
Davies vs. Manolis, 179 F. R., 818, 821.

See isolated appellate court case tending to the contrary, White vs. Gregory, 213, F. R., 768, modified by the same judges since, on this very point in Healy vs. Bakus, 221 F. R., 258, 364-5, 9th Circ. (considered *post,* pp. 70-3).

It is true that the decision of immigration officials as to the facts is conclusive and binding on the Courts under Section 25 of the Act of 1907, cited by Judge Lacombe (fol. 43), but that Act and its predecessors were construed in all the cases cited as not making administrative decisions final, where the forms of due

process of law even were disregarded, or where there was no evidence whatever justifying the result reached in the administrative hearing. It will be remembered that, even aside from the general statutory grant of authority to the Federal Court to issue writs of *habeas corpus,* and consitutional protection of that writ, the Immigration Act, in Section 29, still confers jurisdiction on the Federal Courts of "all causes, civil and criminal, arising under any of the provisions of this Act," which alone would suffice to give the courts jurisdiction, subject to non-reviewability of findings on the facts under Section 25. (*U. S. vs. Jung Ah Lung,* 124 U. S., 621, 626-630. *Chin Yow vs. U. S.,* 208 U. S., 8).

Similar provisions under our Customs Laws, making determinations of appraising officers final, have been similarly construed, as not ousting the courts of jurisdiction, to review determinations reached on wrong theories of the law, or without any facts to sustain them (U. S. vs. Passavant, 169 U. S., 16, 20-21; U. S. vs. Haviland, 167 R. R., 414, aff'd, 177 F. R., 175, C. C. A., and Certiorari denied, 216 U. S., 618), and also under our Postal Laws (School of Magnetic Healing vs. McAnnulty, 187 U. S., 94, 108; Public Clearing House vs. Coyne, 194 U. S., 497, 515), and under other laws, including our land laws (Howe vs. Parker, 190 F. R., 738, 746, C. C. A., and cases there cited.)

In *Williams vs. U. S. ex rel. Klein,* 206 F. R., 460 (C. C. A.), the Circuit Court of Appeals for the Second Circuit, approved of Judge Holt's views (189 F. 915), discharging an alien who had been excluded as likely to become a public charge, and held that there was no evidence justifying such conclusion, and agreed with Judge Holt's characterization that the view of the evidence to the contrary taken by the immigration authorities, was

> "'Strained, far-fetched and almost fantastical.' * * * We cannot assume a proposition which has no evidence to sustain it, and which is contrary to the proof and all the presumptions to be drawn therefrom."

This was said of an actress who came over with her husband under false names to escape creditors with $130 in cash between them, one quarter of which was spent for legal services before landing, but with employment offered them here after landing. This view was in accord with the construction of this act previously adopted by that Court in the Rosen and Bauder cases, *supra*, as also in the other cases cited, in various circuits, particularly illuminating being the discussion of the question by the Circuit Court of Appeals for the Seventh Circuit in *Davis vs. Manolis*, of the Circuit Court of Appeals for the 8th Circ. in *Whitfield vs. Hanges*, 222 F. R., 745, and of the Circuit Court of Appeals for the Sixth Circuit in *Frick vs. Lewis, supra*, thereafter affirmed by this Court in 233 U. S., 291. As said by Judge Seaman for the Court in the first of these cases as to a conceded alien:

> "Final determination of the statute applicable to the case and interpretation (to say the least) of the grant of power therein cannot rest with the executive officer under any authority cited; nor can such finality of executive decision have sanction under our system of government. Whatever may be the powers, even of judicial nature, vested in such officers for needful and summary enforcement of the governmental policy, we believe ultimate decision of the fundamental questions above stated must remain with the courts."

In *Frick vs. Lewis, supra*, the Circuit Court of Appeals said:

> "The Court believed that there was no evidence tending to support any of the charges, except the one concerning the woman. Where there is nothing to support a charge, we agree that the department cannot rightfully issue a warrant to deport, for that would be a clear abuse of power. * * * The question is whether anything was offered that tends, though slightly, to sustain the charge."

As above noted, this Court disposed of that case on appeal on this very theory of reviewability.

The very recent opinion of Sanborn, J., for the C. C. A., for the 8th Circuit in *Whitfield vs. Hanges*, 222 F. R., 745, 751, ably collates the authorities to the same effect.

(b) These cases are all in line with the early federal decisions that *a person cannot be excluded as likely to become a public charge, unless there be some evidence of substantial affirmative disabilities*, and that all the agencies at the disposal of the immigrant to aid him in his new home, including the assistance of relatives not legally obligated to support him, and of friends, must be taken into account, in deciding the "likely to become a public charge" issue.

In re Feinknopf, 47 F. R., 447.
In re O'Sullivan, 31 F. 447.
In re Bracmadfar, 37 F. R., 774, 776, Brown J.
In re Day, 27 F. R., 678, Brown, J.
U. S. vs. Lipkis, 56 F. R., 427, 428.
Ex parte Saraceno, 182, F. R., 955.
Ex parte Petkos (quoted pp. 50-1).
Williams vs. U. S. ex rel. Klein (quoted ante pp. 40-1).
U. S. ex rel. vs. Williams, 204 F. R., 828.

In the leading case on the subject, the Feinknopf case, *supra*, the immigrant was forty years old, vigorous and well, a cabinet maker by trade, had no family; had baggage with him worth $20 and fifty cents in cash, and was willing to work at his trade. In the

course of an opinion reversing an order of exclusion, the Court said:

> "When a record shows a determination that the immigrant is likely to become a public charge, made without a particle of evidence tending to prove the fact, there has been no such determination as the statute contemplates, and in the absence of such a determination, no valid order for the return of the petitioner can be made."

In *United States v. Lipkis, supra,* Judge Brown held that no bond against liability to become a public charge, even, should be required, simply because a man has very little money, saying (at p. 428) that:

> "When an able-bodied workman comes to this country, who is able to take care of himself and his family, and is likely to procure remunerative work in his trade, it is not the practice to require a bond from him merely because he may have but little ready money, and upon the mere possibility that he may meet with some accident that may make him a cripple and thus render him and his family a publice charge. For at the time of arrival he is not likely to become a public charge, his health, capacity for work, and the probability that he will obtain work, furnish ordinary and sufficient security, in the ordinary course of things, against any such liability."

And in *In re Bracmadfar, supra,* Judge Brown sustained a writ of *habeas corpus* sued out on behalf of twenty-one (21) Armenian immigrants, and directed their admission, even though some of them possessed very little money, it appearing that they were all able-bodied and healthy, and that nearly all of them had friends in this city.

In *In re Day, supra,* Judge Brown held (at p. 681), as to minor aliens going to farmers, with whom they had been apprenticed, that:

> "*All the means of care or support that are provided for the passenger, and are available for his benefit, must be taken into account.* The law intends those only, that are likely to 'become a public charge,' because they can neither take care of themselves, nor are under the charge or protection of any other person, *who, by natural relation or by assumed responsibility, furnishes reasonable assurance that they will not become a charge upon the public.*"

This case was followed as authoritative on July 28, 1909, on this very question by Mr. Earl as solicitor for the Department of Commerce and Labor in an able opinion, and the principle applied in other cases cited above. In fact, Sec. 7 of the Immigration Act of 1893, and again Sec. 25 of the Act of 1903, expressly authorized accepting bonds or guarantees against aliens becoming public charges, even from a "charitable or benevolent society or association," with the approval of the secretary.

In an important State paper, Mr. Bayard as Secretary of State, writing to the British Ambassador, clearly showed that our national legislative policy is not, and should not be, to exclude immigrants because of *poverty*, or in view of our treaties with various foreign countries, conferring equality of rights, because of chauvinistic and unwarranted *valuations of relative race values*, even under the new and specious far-fetched theory that race prejudice against certain aliens may tend to make them become public charges, because of enhanced difficulty in finding employment here. When Secretary Bayard wrote, in 1887, the public charge provision which he considered was, substantially the same as now, Sec. 2 of the Act of 1882, excluding an alien "unable to take care of himself or herself without becoming a public charge," though the provisions of the Act of 1891 (Sec. 1) and

1903, (Sec. 2), were subsequently added, using the simpler phrase "persons likely to become a public charge" and throwing the burden of proof to establish admissibility on a person" whose ticket or passage is paid for with the money of another, or who is assisted by others to come," as also the Act of 1907, forbidding the admission absolutely of persons whose passage was directly or indirectly paid for by corporations, societies, municipalities, or foreign governments. Secretary Bayard addressed himself particularly to Irish immigrants who were being sent over by the British Government at its expense, and whose cases soon after were considered in *In re O'Sullivan*, 31 F. R. 447, and he wrote regarding Sec. 2 of the Act of Aug. 3, 1882:

> "The only test therein provided is the ability of the intended immigrant, 'to take care of himself or herself without becoming a public charge,' and *this test is to be applied impartially to all persons of whatever nationality.* The economic and political conditions of the United States *have always led the Government to favor immigration, and all persons seeking a new field of effort and coming hither with a view to the improvement of their condition by the free exercise of their faculties, have been cordially received,* and the same conditions have caused other kinds of immigration to be regarded as undesirable, and led to the addition of other enumerated classes. Such immigration the economic and political conditions of the United States render peculiarly unwelcome. In view of this policy and these laws, this Government could not fail to look with disfavor and concern upon the sending to this country by foreign Governmental agencies and at the public cost, of persons not only unlikely to develop quantities of thrift and self-support, but sent here because it is assumed that they have friends in this country able to 'help and support them.' *The mere fact of poverty has*

> *never been regarded as an objection to an immigrant and a large part of those who have come to our shores have been persons who relied for support solely upon the exercise of thrift and manual industry, and to such persons, it may be said, the development of the country has in a large degree been due"* (Foreign Relations of U. S. for 1887, pp. 520-1).

Of course, in his comments regarding expectant aid from friends here, Secretary Bayard did not seek to ignore such aid as an important factor, serving the immigrant, but he was dealing with the excuse proffered by England for thus sending at a foreign government's expense, dependent aliens over. As seen *ante,* the Courts have expressly recognized the importance of such factor in minimizing the possibility of aliens becoming public charges. However, while recognizing such foreign State aid to immigration as a factor on the public charge issues, these very aliens were admitted nevertheless by the Court in *In re O'Sullivan, supra,* and Congress subsequently dealt with the question as indicated.

Moreover, as was well said by the Committee of Congress, which framed the original "assisted immigration provision" in the Act of 1891, in its Report (H. Rept. 52nd, Cong. 2nd Session, No. 3472 p. IV), under date of Jan. 14th, 1891:

> "Assisted immigration is of two kinds: *Those assisted by friends from this side of the water is the best class of immigration, for they have relatives or friends here who will care for them in their untried surroundings.* But the immigrant assisted from the other side usually has no friends here, and if any on the other side, their chiefest interest is in getting rid of what is likely soon to become a burden. The assisted ticket immigrant should not be made an excluded class, but our experience has been so unfortunate that it is prudent to have

him show affirmatively that he does not belong to one of the excluded classes."

(c) As has been well said: (quoted Imm. Comm. Reports, Vol. 41, p. 145).

> "Once a foreigner has shown that he is able-bodied, free from contagious diseases, and neither a criminal, an anarchist, nor polygamist, nor certain to become a public charge, he has made out a *prima facie* case for his admission.
>
> As to the fear of letting in aliens to become public charges upon public charity, it seems to us that *the provision of the law which orders such immigrants back within three years after their arrival should encourage clemency at Ellis Island, rather than harshness. If the immigrant who falls into pauperism can be gotten rid of within three years, why should our immigration officers speculate excessively upon the chances of an immigrant becoming a pauper?* Here again he should be given the benefit of the doubt—given a chance to show that what this country offers its newcomers is not poverty, but a living."

(d) It will furthermore be noticed that Congress recognized that the words "likely to become a public charge" had acquired so clear and settled a meaning by years of judicial and practical construction that in the Act of 1907 (Sec. 2), it made a separate class of excludable aliens, while retaining the old class, by the words:

> "Persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeons as being mentally or physically defectives, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living."

Even when it enacted these precise words "likely to become a public charge" in 1891 and thereafter re-

enacted them, *they were used in the light of their uniform and well established prior judicial construction, as seen.*

(e) Some aspects of the supposed disabilities of petitioners are more fully considered on the facts (*ante*, pp. 11-17).

POINT II.

Even as regards matters that may be judicially noticed, without formal proof, the matter relied upon must be specifically referred to on the trial, and produced, so that the immigrant may know what is relied upon to exclude him, and can meet it by proof.

(a) *Even as regards matters judicially noticeable, the authority relied upon should be produced in court, and the fact of judicial notice being taken, spread upon the record before the close of the case, so that proof can be adduced by the other side to meet the same.*

In *McKinnon vs. Bliss*, 21 N. Y., 206, 214-5, the Court held, in connection with a review of the earlier authorities, that *even matter intended to be noticed judicially, should be produced in court and specifically pointed out.* Said the Court:

> *"In the first place it was not introduced or offered upon the trial.* There are no doubt cases in which courts, upon questions addressed to them, may take judicial notice of matters of general history and of public and universal notoriety, which admit of no dispute. But upon the trial of issues of fact by a jury *if*

> *reliance is placed upon any matter of this kind, some evidence of it must be adducted.* * * * The rule is as here stated. That it should be so, is obvious, not only in order that the jury may all be equally possessed of the evidence from which their conclusions are to be drawn, but that the facts upon which their conduct is based, may be known."

See accordingly, Kaolatype Co. vs. Hoke, 30 F. R., 444, 446, as to equity cases.

In *Walton vs. Stafford*, 14 N. Y. App. Div., 310, the Court on appeal was asked to take judicial notice that the first day of January in the year involved was a Sunday, but declined, stating:

> *"It is true that it was not a fact which the defendants were bound to prove in the ordinary way, but it was none the less a fact which they are required—if they desired its consideration—to place in some way before the court and jury.* They were at least bound to bring the fact to the attention of the Court, and to claim for it judicial notice. *As they did not do this, the fact is not in the case."*

In accordance with such established practice, the Court (Coxe, J.), formally described, upon the record, matter noticed judicially in a case tried without jury in

Dominici vs. U. S., 72 F. R., 46.

Similarly, it is well settled that material facts, which can be noticed judicially, may not be left out of the pleadings, when essential or jurisdictional allegations.

> *Arkansas vs. Kansas Coal Co.*, 183 U. S., 185, 189-190.

In the last cited case, the Court quoted with approval from Thayer on Evidence, Ch. VII, page 281, in its treatment of "judicial notice," as follows:

> *"The right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication, which regulate the mode of bringing controversies into court, and of stating and conducting them."*

The same learned author well says in that treatise, on page 309, in discussing the limits of judicial notice:

> *"This function is indeed a delicate one; if it is too loosely or ignorantly exercised, it may annul the principles of evidence and even of substantive law."*

The precise question was considered, with respect to the right of a board of special inquiry to take judicial notice of facts, in the recent case of

Ex p. Petkos, 212 F. R., 275 (Morton, J.).

The relator was excluded by the Board of Special Inquiry, because they found that he had a non-contagious skin disease which, they inferred, without proof, and erroneously, would tend to make him a public charge, by reason of its supposed offensive odor and appearance, and its making him obnoxious in consequence. Said the Court, in entertaining jurisdiction in *habeas corpus* proceedings, after citing some authorities above considered:

> *"A fair hearing implies* that a party concerned shall not only have an opportunity to present evidence in his favor (which was fully accorded in this instance), *but also that he shall be apprised of the evidence against him, so that at the conclusion of the hearing he may be in a position to know all the evidence on which the matter is to be decided.* * * *
>
> *"In this case the immigration tribunals decided, 'as matter of common knowledge,' in the* first instance that psoriasis causes an odor so offensive as to make the sufferer obnoxious

to persons about him, whereas in fact it appears to have no odor at all; and, in the second instance, that, although the disease has no odor, its appearance would be so repulsive as to interfere with the petitioner's ability to get work, whereas in fact the disease rarely shows itself on the exposed parts of the body.

"There was here no conflict of evidence, as in the cases cited for the respondent; *nor did the inspectors base their action on the appearance of the immigrant,* as in *Nishimura Ekiu vs. United States,* 142 U. S., 651, 660, 12 Sup. Ct., 336, 35 L. Ed., 1146. *They acted on their own mistaken assumption that they knew about a matter, of which there was no evidence* and which appears to have been beyond their knowledge. Whether this is called an 'abuse of discretion,' or an 'unreasonable conclusion,' or 'arbitrary conduct,' it was plainly unfair and injurious to the petitioner. *He could not foresee that the immigration officials would assume to be familiar with the characteristics of psoriasis, still less that their assumption of knowledge would lead them into such fundamental errors concerning it as appear in their findings, and to a conclusion, apparently erroneous, and certainly unsupported by any evidence. He was never apprised of the evidence on which he is to be deported and has had no opportunity to met it. It is not that the decision was wrong, but that it was reached by wrong methods, and, as it seems to me, in disregard of fundamental principles.*

"I find and rule that the petitioner has not had a fair hearing before the immigration authorities; that under the rule laid down in *Chin Yow vs. United States, supra,* the jurisdiction of this court has attached; that the writ of habeas corpus must issue; and that there must be a hearing on the merits before this court."

This view was affirmed on appeal in 214 F. R., 978 C. C. A., 1st Circ., where the appellate court said

that the adverse finding of the Court "was founded *upon their mistaken assumption unsupported by any lawful evidence,* that his disability necessarily affected his ability to earn a living."

In *Whitfield vs. Hanges,* 222 F. R., 745, C. C. A., the Court, Sanborn, J., writing held that a warrant of deportation was improperly issued where the only evidence against the alien was gathered before the warrant of arrest issued, and was in the shape of *ex parte* affidavits not introduced in evidence at the hearings on the warrant and which the inspectors had no authority at that time to take under oath, and cross-examination of which witnesses on behalf of the aliens the inspector prevented after the arrest. Said the Court:

> *"Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected;* that the accused shall be notified of the nature of the charge against him in time to meet it; *that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it* (p. 497). * * *
>
> "During the hearing the inspector permitted counsel for the appellees to read the statements he and the police officers had drawn from the prostitutes before the arrest was made, *but neither he nor the government offered or introduced these statements in evidence, nor would they have constituted evidence if offered because, since the inspector had no authority to administer an oath, they were not sworn to,* be-

cause they were the statements of the prostitutes extracted in secret under the ever-present fear which the call or seizure by police or other officers of persons of their character unavoidably imposes upon them, and because these women had not been called to the hearing and the appellees had no opportunity to cross-examine them. These women were at the command of the inspector. He called them by means of the police, and he had the power to call them again. The record convinces that he or his servants, the police officers, caused them to be notified that they were not required to respond to the call of the the appellees. *During the hearing counsel for the appellees requested the inspector to call them in order that the counsel for the appellees might examine them, requested that in the interest of a fair hearing he exercise the same power to procure evidence of the truth from the same parties that he had exercised to procure statements from them against the appellees.* The appellees had no right to subpoena and no other method to get these women to come and testify, but the inspector refused to call them. The chief of police, and Campbell, the captain, were present at the hearing. Counsel for the appellees requested each of them to take the stand and testify. The chief refused to do so, but said he might do so if the inspector requested him. Campbell said he would testify if the government man allowed him to. Counsel for the appellees asked the inspector to assist in developing the truth by requesting the officers to testify. He refused, and they did not testify, except at the subsequent call of the inspector in rebuttal, and then only to matters not relevant to the charges against the aliens. * * * And that is not a fair hearing in which the inspector, with his control of important witnesses takes their statements in a secret *ex parte* examination before himself prior to the hearing, and then refuses the request of the accused to call them, or to re-

quest them to testify at the hearing, and thereby *deprives the accused of the opportunity to examine or cross-examine them and to have the benefit of their testimony.* Chin Yow v. United States, 208 U. S., 8, 11, 12, 28 Sup. Ct., 201, 52 L. Ed., 369; United States vs. Sibray (C. C.), 178 Fed., 144, 149; United States vs. Williams (D. C.), 185 Fed., 598, 604; Roux vs. Commissioner of Immigration, 203 Fed., 413, 417, 121 C. C. A., 523.

"After the hearing the inspector made and forwarded his report and recommendation to the effect that the appellees were guilty of the charges, and that they should be deported. This report states the evidence on which it is founded, and discloses the fact that *it is based, not on the evidence at the hearing, but on the statements of the prostitutes extracted before the arrest, which are condensed and recited in the report, and on rumors and hearsay which are set forth in the report, in support of which there was no evidence in the case, of which the accused had no notice and which he had no opportunity to refute by evidence or otherwise.* * * *

"Here is another *statement unsupported by any evidence, and not mentioned at the trial,* a statement illustrative of the basis of the finding and recommendation of the inspector:

" 'I inclose herewith a *newspaper article* taken from the Mason City Gazette of November 5, 1913, showing that the body of the murdered child of Ada Burgess has been removed from its burying place, and is believed to be the work of Greeks, friends of Louis Chirikos. The police officers tell me they have a great deal of trouble with the Greeks of Mason City.'

"That was not a fair hearing in which the inspector after the hearing imported into the case and based his finding and recommendation of deportation on hearsay and rumors of alleged facts which there was no evidence to support, and which the accused had no notice of and no opportunity to refute at the hearing.

Interstate Commerce Comm. vs. Louisville & Nashville R. R. Co., 227 U. S., 88, 93, 33 Sup. Ct., 185, 57 L. Ed., 431; *Ex parte Petkos* (D. C.), 212 Fed., 275, 277, 278."

This case is, of course, directly inconsistent with the view that the immigration authorities may decide cases on unsworn, unproduced, testimony. It involved Sec. 20 of the Act of 1907, as to deportation procedure which this Court in The Japanese Immigrant Case, *supra*, held must be made to conform to due process of law. Sec. 25 of the Act of 1907 is much clearer and more emphatic in requiring boards of special inquiry to "keep a complete permanent record * * * of all such *testimony* as may be produced before them," and that the appeal shall be determined "solely upon the evidence adduced before the boards of special inqury," and clearly requires *sworn* testimony. The peculiar connotation of the term "testimony" is that the proof must be taken under oath (Cyc., Vol. 16, p. 849; 38 Cyc., 248; Edelstein vs. U. S., 149 F. R., 636, 640, C. C. A. certiorari denied; 205 U. S., 543), though it may, in appropriate cases include affidavits (38 Cyc., 248, citing Woods vs. State, 134 Ind., 35, 42; Edelstein vs. U. S., *supra*).

See also authorities cited under Point I, and particularly *Davies vs. Manolis* (*ante*, pp. 21-2). *Rodgers vs. U. S.* (*ante*, pp. 23-4) and *In re Con Pon* (*ante*, pp. 27-8), also *Interst. Com. Comm. vs. L. & N. R. Co.*, 227 U. S., 88 (quoted *post*, pp. 60-2; also *ante*, pp. 15-16).

(b) *Where courts take judicial notice of facts and err in their assumed facts, a question of law is presented.* Said the Court in *U. S. vs. 1,500 Bales Cotton*, 27 F. C., 15,958:

> "If the judge assumes the duty of its determination he must decide it correctly * * *. *It is as much an error for the Court to mistake*

an historical fact of which it has taken cognizance as to mistake a principle of law."
See acc. Ex. p. Petkos, *supra* (quoted *ante*, pp. 50-2).

(c) *Particularly under the Immigration Law procedure, by which the alien is examined without the aid of counsel or friend before the Board, and is generally unfamiliar with our language and procedure, but on appeal is limited to this record, it is important that he should know all the facts and his right there to meet the government contentions.*

(d) As already pointed out herein, the practice applicable to habeas proceedings in the federal courts makes it incumbent on the government to produce the documents it relied upon, and the same result is reached by the rule requiring a party to produce evidence preculiarly in his own power, otherwise it is presumed to be non-existent (*ante*, pp. 4-5, 9). Upon this record, therefore, there is no proof whatever of the alleged unfavorable labor conditions on which the board based its decision.

(e) It is thus apparent that due process of law was here denied, whether the Board might or might not take judicial notice of the alleged labor conditions, because *the alleged reports were not produced before the Board, even in newspaper form,* and relators were not apprised that they would be relied upon, and hence had no opportunity to meet them and *because they were not included in the record on the appeal, though the Act and the rule require all the evidence, before the Board to be sent up on the appeal.* Judge Ward in his dissenting opinion, properly emphasized the defect of procedure and consequent injustice involved, in omitting these reports from the record sent to the secretary on the appeal (fol. 60).

(f) Moreover, *statutes like the immigration laws fall within the general class of statutes in derogation*

of personal liberty which should be construed in favor of individual liberty and personal right (*Moffett vs. U. S.*, 128 F. R., 375, 378, C. C. A., *Tsoi Sim vs. U. S.*, 116 F. R., 920, C. C. A., *Redfern vs. Halpert*, 186 F. R., 150, C. C. A., *The Japanese Immigrant Case*, 189 U. S., 86, *Lieber's Hermentics* [3rd Ed.], pp. 128-9, 137, *Martin vs. Goldstein*, 20 App. Div., 203, 206, *Am. & Eng. Ency. of Law*, Vol. 26, pp. 661-2, 659, 646, 8 of 2nd Ed.,)

POINT III.

Even if Boards of Special Inquiry have the powers of Courts, to take judicial notice of facts which Courts might notice judicially, when properly presented before them, still even Courts cannot notice judicially such facts as are here involved, under the authorities governing judicial notice, especially not on the basis of alleged newspaper reports, not produced or even identified.

I. (1) Presumably certain notorious uncontroverted facts "which everybody knows," may be noticed judicially by courts and also by boards of special inquiry, such as are mentioned by way of illustration in the opinion of the lower Court, like a supposititous destruction of Portland by flood or fire, or the raging of an epidemic there. This is on the theory that "courts may and should notice without proof, and assume as known by others, whatever, as the phrase is, 'every-

body knows.'" (*Thayer on Evidence*, p. 301; compare *North Hempstead vs. Gregory*, 53 App. Div., 350, 353, *et seq.*). The C. C. A. in *Am. Sulphite Co. vs. De Grasse Co.*, 157 F. R., 660 (Coxe, J., writing), pointed out and applied the necessary limitations on this doctrine, and quoted with approval the statement that—

> *"This power is to be exercised with caution. Care must be taken that the necessary notoriety exists. Every reasonable doubt upon the subject should be promptly resolved in the negative."*

Such uncertain, complex, ever-varying facts, changing constantly in point of time, and differing at the same time, as to different places and lines of industry and relating to distant places—as labor conditions in their relation to a particular person's being able to get employment either in his specialty, or any other, cannot be noticed judicially by the courts. This is expressly conceded in Judge Coxe's opinion below (fol. 57), where he says:

> *"It is true that information in this form would not be permitted in a court of law,* but the immigration officers cannot delay these proceedings indefinitely." (But see *ante*, pp. 15-16).

Practically the identical question was passed upon by Judge Gaynor in *Smid vs. Bernard*, 31 Misc. Rep., 35, 38, where he held that the courts cannot take

> "judicial notice of the local rate of wages for the different grades of work in bakeries in the Bohemian quarter of New York City * * * such notice could not even be taken of the rate of wages in bakeries generally."

Similarly, in *Market Bank vs. Pacific Nat. Bank*, 27 Hun, 465, the Court, at General Term, reversed the action of the Court below in taking judicial no-

tice of the fact, based on general rumor, that defendant bank, located in Boston, was insolvent, saying:

> "To justify a court or judicial officer in acting upon knowledge or information thus acquired (by judicial notice), it can only be in regard to *a matter which has become notorious and of general public interest and concern, and not in regard to a transaction, custom or event of mere local or private interest, possessing little notoriety.*"

Compare *Whitfield vs. Hanges* and Ex. p. Petkos (quoted *ante*, pp. 54-5, 50-2).

To take judicial notice of the alleged facts here involved, runs counter to well-established principles, regarding the limitations upon judicial notice.

(a) *"Facts of recent occurrence relating to a limited section of country cannot be considered as covered by judicial knowledge, as matter of history."*

Cyc. of Law & Proc., Vol. 16, p. 868.
Morris vs. Harmer, 7 Peters, 554, 558.
McKinnon vs. Bliss, 21 N. Y., 206, 216.
North Hempstead vs. Gregory, 53 App. Div., 350, 355.
Market Bank vs. Pacific Nat. Bank, supra.
Smid vs. Bernard, supra.

Said the Court in *McKinnon vs. Bliss, supra:*

> *"Such evidence is only admissible to prove facts of a general and public nature, and not those which concern individuals or mere local communities."*

(b) *Matters constantly changing materially and not definitely fixed and "known by everybody," cannot thus be noticed.*

Cyc. of Law & Proc., Vol. 16, pp. 870, 871.
Adams vs. Elwood, 176 N. Y., 106.
Kokes vs. State, 55 Nebr., 691, 701.
Bank vs. Ayers, 160 U. S., 660.

In *Adams vs. Elwood, supra,* the question was presented whether a county judge was disqualified from acting as a referee under the Constitutional provision, forbidding such appointment of county judges in counties having more than 120,000 inhabitants, but the Court said it could not notice such alleged fact judicially, saying:

> "There may be a moral certainty that the population of Queens County in 1900 exceeded 120,000, but in this matter we can take judicial notice of nothing but facts authenticated by public records."

In *Bank vs. Ayers, supra,* this Court said:

> "The relative proportions in which the moneyed capital of the State of Kansas is invested in the various kinds of securities to be therein found, this Court cannot judicially know."

(c) *It is also well settled that the courts should hesitate to take judicial notice of facts in controversy in the action.*

North Hempstead vs. Gregory, 53 App. Div., 350, 357.
Patent Button Co. vs. Consol. Fastener Co., 84 F. R., 189.
Walton vs. Stafford, 14 App. Div., 310, 313.

(2) *The limitations upon the right to notice facts judicially are more, not less, stringent, as applied to administrative bodies, which naturally are commonly composed of men of much less intelligence, judgment and independence than are our courts and especially as against aliens denied the right to counsel and advisors until after exclusion by the board, and commonly unfamiliar with our language and procedure.*

In the very recent case of *Int. Comm. Commission vs. Louisville & N. R. R.,* 227 U. S., 88, 91, 93, substantially the same question was involved. The Inter-

state Commerce Commission sought to sustain an order against defendant upon the basis of its own *ex parte* investigations and knowledge, in addition to the evidence adduced when defendant was represented. This Court carefully considered the authorities applicable to administrative hearings, including several of the immigration cases relied upon herein by the Government (p. 91), and said emphatically in a unanimous opinion, in passages expressly including immigration officials:

> *"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the constitution's condemnation of all arbitrary exercise of power.* * * *
>
> "The Government further insists that *the Commerce Act* (36 *Stat.*, 743,) *requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and* having been given legislative power to make rates, *it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evi-*

dence is offered or considered and is not given an opportunity to test, explain or refute. The information gathered under the provisions of Section 12 may be used as a basis for instituting prosecutions for violations of the law, and for many other purposes, but *is not available as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and,* even where it acts in a *quasi* judicial capacity, *is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Int. Com. Comm. vs. Baird,* 194 U. S., 25. *But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.* In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. *All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.* In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding."

This was followed as controlling under the Immigration Act in *Hanges vs. Whitfield, supra* (pp. 52-5). See accordingly, as to police trials:

Peo. ex rel. Clark vs. Roosevelt, 168 N. Y., 488.

(3) *To vest such sweeping power in $1,800 a year Inspectors under the Immigration Laws, who are notoriously lacking in education, and weak, in general,*

but who are vested with power to pass on the rights of over a million persons a year, including claims to citizenship, would be a public calamity, and the present instance is the first one in which any Court, in any reported decision, has sustained such claim.

Said the Immigration Commission unanimously of the Inspectors constituting Boards of Special Inquiry in its report to Congress of Dec. 5, 1910 (Senate Document No. 747 of the 61st Congress, 3rd Session, Vol. I), after it had investigated the work of these inspectors:

> "The boards exercise a power which, if not properly used may result in injustice to the immigrant, or, through the admission of undesirable aliens, in harm to the country. *It is important, therefore, that these boards, should be composed of unprejudiced men of ability, training, and good judgment.* * * *
>
> *"At all the important parts the boards of special inquiry are composed of immigrant inspectors who generally are without judicial or legal training. This, together with the fact that they are selected by the Commissioners of Immigration at the ports where they serve, tends to impair the judicial character of the board and to influence its members in a greater or less degree to reflect in their decisions the attitude of the Commissioner in determining the cases.* The character of their decisions is indicated somewhat by the fact that nearly fifty per cent of the cases appealed are reversed by the Secretary of Commerce and Labor, whose decision, under the law, must be based solely upon the evidence adduced before the board. This record of reversal on appeal suggests that their decisions which are not reviewed, may be equally wrong.
>
> *"In justice to the immigrant, and to the country as well, the character of these boards should be improved. They should be composed of men whose ability and training fit them for the judicial functions performed,* and the provision

compelling their hearings to be separate and apart from the public should be repealed." (Compare U. S. vs. Sing Tuck, 194 U. S. 161 at 169-170, 176-7, indicating that the practice of construing this provision as forbidding the presence of counsel or advisor is erroneous and Pres. Roosevelt's Ellis Island Commission also so reported. Vol. 41, Imm. Comm. Repts., 173).

As bearing on the practical workings of a rule which would vest these inspectors with power to assume such unproven facts, reference is prayed to some recent cases in the courts. In *ex parte Petkos, supra* (pp. 50-2), they assumed, without proof and contrary to the facts, that the disease involved, psoriasis, caused an offensive odor; on a rehearing, when their blunder seems to have been called to their attention, they assumed, without evidence and contrary to the facts, that its appearance, and not its odor, caused its victim to appear repulsive. In the *Klein* case, the Court felt constrained to approve Judge Holt's statement that their conclusion that relator was likely to become a public charge was "strained, far-fetched and almost fantastical." In two recent cases, they dissuaded their victims from securing the aid of counsel in deportation proceedings on the pretext that there would be a better chance for discharge without such aid, but in fact, in order to "railroad" them more easily (*U. S. vs. Williams,* 185 F. R., 598; *Roux vs. Commissioners,* 203 F. R., 413). In two other cases they ignored prior judicial determinations of American citizenship (171 F. R., 413, C. C. A.; 187 F. R. 544 C. C. A.), despite prior judicial decisions adjudicating the binding force of such determinations. In *U. S. vs. Wong Chang,* 92 F. R., 141, Judge Coxe characterized their determination based on a hearsay report, as "such stuff as dreams are made of," and that "no man whose brain is in a normal condition

would regulate the most trivial affairs of life upon such information." See also *Whitfield vs. Hanges*, 222 F. R., 745, C. C. A., and *Zouras vs. Allen*, 222 F. R., 756, C. C. A. These are but samples. Surely, such course would be a denial of "due process of law."

(II) *Even if such facts regarding economic conditions can be noticed judicially, the alleged newspaper reports here involved could not lawfully be considered as the basis for judicial notice, and there is no other proof of the alleged facts in question.*

(1) The rule is correctly laid down in *Walton vs. Stafford*, 14 App. Div., 310, that "the party asking the court to take judicial notice thereof must, at the judge's request, furnish the proper books or documentary evidence wherewith to refresh his recollection." There is a consensus of opinion that newspaper reports are, in general, not proper sources of information where judicial notice is to be taken.

Said the Court in *Whelan vs. Lynch*, 60 N. Y., 469, 474:

> *"It is not plain how a newspaper,* containing the price current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, *can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depend entirely upon the sources from which the information is derived. Mere quotations from other newspapers or information obtained from those who have not the means of procuring it, would be entitled to but little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself, without some proof of knowledge of the mode in which the list was made out. As there was no*

> *such testimony, the evidence was entirely incompetent,* and should not have been received."

See also:

> *Downs vs. N. Y. Central,* 47 N. Y., 83.

In *Longley vs. Smith,* 3 St. Rep., 276, McAdam, J., writing, it was held to have been error to have received a directory in evidence as proof of defendant's address; said the Court:

> "There is no rule making a directory evidence *per se. The accuracy and reliability of such publications depend entirely upon the source from which the information it contained is obtained.* The statement in the directory was unverified, and *no attempt was made to show by whose or what authority the name and address of the defendant appeared, or how, when, where, from what, from whom, or by whom the information was obtained, so as to connect the defendant with the publication or even charge him with knowledge of it.* Evidence of this sort must be considered as mere hearsay, and as such is of an unreliable character. *Matters alleged in historical, professional, statistical or scientific books, not of a general and public nature and concerning* only individuals or *local communities,* when relevant to an issue, *must be proved as other facts;* that is to say, this must be verified by oral evidence showing their reliability."

See also

> *Harris vs. Panama Co.,* 3 Bosw., 7.
> *McKinnon vs. Bliss,* 21 N. Y., 215.
> *Caldwell vs. National Bank,* 64 Barb., 333; Greenl. Ev., Sec. 440, note.
> *Morris vs. Harmer's Estate,* 7 Peters, 554.
> *Whitfield vs. Hanges* (quoted, *ante,* p. 54).

(2) *The lower court was evidently misled as to the sources of these alleged facts,* which are referred to in

the majority opinion as "published reports and inquiries," "the press and other sources." (fols. 56, 57). We beg leave to supplement Judge Ward's comment on their inadequacy, he having said in his dissenting opinion (fol. 60):

> "The board does not state whether the reports were oral or written, when they were made, who made them, whether the person or persons who made them were qualified to express an opinion, or what the reports were."

It will be noticed that the only definite statement regarding their character is to be found in Mr. Uhl's letters of transmittal (fols. 28, 39), made some days *after* the hearing, and obviously based on his inquiries outside of the record on the subject, for he refers to further facts that occurred at the hearing, not disclosed by the record, *i. e.*, the alleged inability of all but one of the aliens to speak anything but their own dialect (fol. 39). He frankly states that the assumption in question was based on "*the information contained in the press of recent date*" (fol. 28). This analysis of the facts shows the real nature of the "reports," mere unproduced and unidentified alleged newspaper reports, that the board pompously referred to in its decision as "recent employment reports of industrial conditions at Portland and vicinity" (fol. 26; compare 31, 37).

(3) Inquiry made in Washington at the Department of Labor since this Court's decision, indicates that the department had no reports on the subject at the time these cases were before the board. In fact, we learn that some weeks previously the Department had discontinued the practice of having its employees furnish it with reports of this kind in connection with contract labor law investigations, because they arrived too late to be of value and were otherwise also unreliable. It will be noticed that no date of publication of the alleged newspaper reports is given, as

pointed out by Judge Ward, nor anything bearing on their accuracy or origin, nor their comprehensiveness. It should be remembered that conditions in different industries, even at the same time and place, are widely different, some being very busy, while others may be idle, but the reports are not claimed to refer to any particular industry. So also places near each other are often in materially different conditions in this respect. Moreover, often employment is seasonal, involving occasional periods of unemployment, compensated for by higher wages at the time of employment in such pursuits. The work of "farm laborers" —the occupation of relators—became particularly active about February, and thereafter throughout the summer and autumn, and the official Government conference report cited *ante* (p. 12), shows that many thousands of farm hands move each year into our agricultural districts, to work there, and then depart in the fall to take up other work, and whose labor the country at large absolutely needs. Nothing, moreover, is more difficult for even the expert to master than industrial employment conditions, as they are made up of so many different and ever-changing factors. Nor is anything so misleading as inferences from non-employment of some people at any particular time, for it is of course notorious that lack of character, laziness, lack of opportunity or of influence, whim or unwillingness to take up particular lines of work, result in some people being out of work at all times in a community, even when there is the greatest demand for labor in the very community involved. As pointed out, *ante* (pp. 10, 11-12), "farm laborers," like those here involved, are particularly needed by the country, and have no difficulty in finding work. Relators were destined to the vicinity of Portland, be-

cause a couple of thousand of their race, Ossetes, have migrated to the United States during the past few years, making the vicinity of Portland their headquarters, and there, among their countrymen, converse readily with each other, and help each other, and succeed. Some persons are, moreover, always interested for political reasons in exaggerating reports of non-employment, and making them sensational.

It is not without interest to observe in this connection that the Commissioner of Labor of the State of New York publicly on February 27, 1914, denied published newspaper reports that there were 300,000 unemployed in New York City at that time, after careful investigation, and stated that it is an exaggeration to say that there were so many unemployed in the whole State.

So, also, Royal Meeker, U. S. Commissioner of Labor Statistics, in April of the present year frankly said (Annals of Am. Academy of Political and Social Science, Vol. LXI, whole No. 150, p. 24).

> "The fact is that in this country we have a very complete fund of ignorance on the question of unemployment. We have no, or practically no, authentic information as to what the normal amount of unemployment is in this country, even at the best of times * * * When I took charge of the Bureau of Labor Statistics I very speedily discovered that so far as the Federal Bureau was concerned, no information existed as to the amount of unemployment or where unemployment existed. Now I conceive that it is the first job of the Federal Commissioner of Labor Statistics to know that very thing. I have been racking my brain, trying to devise ways and means by which I can get some line upon the amount of unemployment from month to month in every important city and locality in the United States. As yet I am still racking."

POINT IV.

The immigration authorities are not authorized to exclude aliens on the supposed ground of unfavorable industrial conditions in the place to which they are destined, because such factor is not one vested in the immigration authorities by Congress as a justifiable ground for exclusion, nor are the petty immigration officials competent to pass upon such uncertain and complicated ever-varying conditions, nor is any satisfactory method of apprising them of the same provided by law, nor on the other hand, are the immigrants wedded to any particular destination, but are quite certain to go to a place economically more desirable than their original proposed destination, if conditions in the latter place so suggest.

(a) This Court has never passed upon this important question. In one aspect it was passed upon below in the case of *ex parte Gregory*, 210 Fed. Rep., 680. There the Board of Special Inquiry in view of uncontroverted local, economic conditions, excluded certain immigrants, avowedly, because of labor conditions rendering it in their opinion improbable that the aliens

would under these conditions be able to get along without becoming public charges. The District Court held this course inadmissable on the ground that Congress did not intend to invest such authority in immigration officials, saying:

> "The findings and conclusions of the Board with relation to the petitioners, however, eliminate all physical and mental deficiencies legislated against. Shall it be said, under such a record, that the examining board can exclude an alien upon the conclusion that he is 'likely to become a public charge,' when, upon the facts found and reasons given, the applicant is not brought within the provisions of the act excluding him from admission? In the findings made there is no disqualification personal to the applicants, nor any objection made because of inability to conform to new conditions and relations. They are not excluded by the provisions of the act. The reasons given do not exclude them under the act. These reasons are proper subjects for the consideration of Congress, but they do not authorize the temporary suspension of the Immigration Act, which the adoption of these findings will do. The laws and principles upon which our government rests forbids the exercise of arbitrary power. Immigration officers must act within the powers given. Courts have power to intervene where they exceed their authority. *Ex parte*, Saraceno (C. C.), 182 Fed., 955; Lewis vs. Frick, (C. C.), 189 Fed., 146; *In re* Feinknopf, (D. C.), 47 Fed., 447; *ex parte* Koerner, (C. C.), 176 Fed., 479; *In re* O'Sullivan, (C. C.), 31 Fed., 447; United States v. Martin, (D. C.), 193 Fed., 795; Gonzales v. Williams, 192 U. S., 1, 24 Sup. Ct. 177, 48 L. Ed., 317."

It is true that this very decision was reversed on appeal by the Circuit Court of Appeals in *White vs. Gregory*, 213 Fed. Rep., 768, (9th Circ.), but the opinion of the appellate court scarcely meets the is-

sue, and seems to be predicated on the untenable theory that the courts will not

> "inquire into the sufficiency of probative facts, nor consider the reason for the conclusions reached by the officers,"

ignoring all the other authorities hereinbefore cited. As already pointed out (p. 39), the same Circuit Court of Appeals in *Healy vs. Backus,* 221 Fed. Rep., 358, materially qualified this holding by expressly conceding judicial review for the purpose of ascertaining whether there was any evidence justifying the result, "as there must be some evidence tending to their support; otherwise there would be error of law on account of which the courts would entertain jurisdiction. United States vs. Williams, 200 Fed. Rep., 538."

Moreover, it is submitted that it is inconsistent with the fundamental principles of our Government that administrative officers should be permitted unlimited discretion in deciding on what grounds they might exclude aliens, whether Congress did or did not vest them with authority to exclude because of economic conditions at destination. The cognizability of such matters is purely a question of law. (Contrast cases quoted *supra,* pp. 20, 39-40, 42, 60-2 and U. S., *ex rel.* Mylius vs. Uhl, 203 F. R., 152, aff.; 210 F. R., 860; and also Yick Wo vs. Hopkins, 118 U. S., 356, as to undefined arbitrary power in a "government of laws not of men." See also adoption by this Court in Hurtado vs. California, 110 U. S. 516, 535 of Webster's classical definition of "due process of law," as precluding unrestrained arbitrary power.)

There is a fitting sequel to the decision in *White vs. Gregory,* in the procedure involved in *Healy vs. Backus, supra,* where the Board of Special Inquiry was held to be justified in excluding Hindoos on the ground that they are the victims of race prejudice,

and thus likely to be more prone to become public charges, though it is common knowledge that persecuted races, like the Chinese and Hindoos, have in practically no known instances become public charges in this country, largely because of their deeper recognition of the ties of blood and race binding them to each other, often strengthened by this very prejudice. It is difficult to distinguish such a holding from the leading case of *Yick Wo vs. Hopkins,* 118 U. S., 356, which this Court recently at its own instance invoked as probably condemnatory of a statute apparently based on race prejudice, in *Quong Wing vs. Kirkendall,* 223 U. S., 59, 63. (Compare Secretary Bayard's view, *ante* pp. 45-6). It will also be noticed that in *Healy vs. Backus,* the decision here under review was cited with approval, but the two cases are distinguishable, because in *Healy vs. Backus, supra,* the evidence relied on, including affidavits, letters and newspaper clippings, was formally adduced, and the aliens given an opportunity to meet the same by similar proof, which they in fact did, and also for the further reason that, as is hereinbefore pointed out, *ante* (pp. 26-7), in deportation proceedings, as distinguished from proceedings before a Board of Special Inquiry, more leeway is permissible in the matter of receiving *ex parte* testimony, because on such application before the Secretary, as much time as may be convenient is afforded to examine the evidence with the aid of counsel and submit further proof to meet it, as distinguished from a summary hearing before the Board of Special Inquiry, followed by an appeal limited to the record made there.

(b) In fact, immigration automatically adjusts itself to economic conditions here, as was pointed out by Secretary Straus in his annual report of 1908 as Secretary of Commerce and Labor, the panic of

1907-8 leading to a reduction of 502,479 in the number of immigrants as against the year ending June 30, 1907, and the departure of 395,073 alien immigrants here in addition. This was also found by the Immigration Commission (Reports I, p. 188).

(c) Moreover, as is hereinbefore pointed out, boards of special inquiry are not constituted of men capable of passing on such complicated, difficult and ever varying questions as industrial conditions in a particular locality, as bearing on likelihood of immigrants destined to such places finding work there. Nor are there any satisfactory methods at hand for apprising boards of special inquiry promptly of such conditions, all of which goes to show that Congress did not intend to have boards of special inquiry suddenly take cognizance of these matters, particularly not under a statute in force for so many years, excluding persons likely to become public charges, under which such right was not claimed till the last few years. (See *ante*, pp. 62-5, 67-9, 47.)

(d) Moreover, immigrants desiring to settle in the United States are seldom wedded to their original proposed place of destination, and hence are quite ready to settle in some other locality, if economic conditions in the former place are unsatisfactory. Accordingly, the economic conditions in a particular place are not very important on this question. Note in this connection the work of the Information Division of the Department of Labor itself, hereinbefore cited, for distributing immigrants to places where work can readily be found, which is being so largely expanded at present; also its conference with State officials, with particular reference to farm labor, hereinbefore cited *ante* (p. 12), and the work of such immigrant removal societies as the Industrial Removal Office in New York.

POINT V.

Where the Courts on Habeas assume jurisdiction to review an order of exclusion, they are themselves to determine the question of admissibility, and not merely to remand relator for a new hearing to the immigration authorities.

This question has generally been regarded as settled ever since the decision of this Court in *Chin Yow vs. United States,* 208 U. S., 8-13, but recently in *United States vs. Petkos,* 214 F. R., 978, at 980, the Court distinguished that case, because there a claim to citizenship was involved, from the case of a conceded alien. In view of that decision, the question was recently carefully reconsidered by the Circuit Court of Appeals for the Eighth Circuit in *Whitfield vs. Hanges,* 222 F. R., 745, at 756, where the Court said, on review of authorities clearly sustaining its conclusion:

> "The order of the court below was that the appellees be discharged without prejudice to the right of the Bureau of Immigration to proceed against them in a lawful manner to prove, if it could do so, the grounds alleged in the warrant of arrest. The practice approved by the Supreme Court and generally prevailing, however, seems to be that the court which takes jurisdiction and custody of the alien under the writ of *habeas corpus* and finds that his hearing has been unfair, retains custody and jurisdiction of him and of the case, and tries on the merits *de novo* on evidence introduced before that court, the question whether or not the alien is guilty of the charges made against him in the warrant of arrest before

making his discharge absolute. Meanwhile the court has ample power to admit the alien to bail or to take his own recognizance. Chin Yow vs. United States, 208 U. S., 8, 13, 28 Sup. Ct., 201, 52 L. Ed., 369; United States vs. Williams (D. C.), 193 Fed., 228, 231, 232; *In re* Con Pon, 168 Fed., 479, 483, 484, 93 C. C. A., 635; *Ex parte* Petkos (D. C.), 212 Fed., 275, 278; *Ex parte* Koerner (C. C.), 176 Fed., 478, 479."

As was well pointed out by Judge Hand in *United States vs. Williams,* 193 F. R., 228, the Courts have no general authority to issue orders to immigration authorities, but their right to dispose of the alien arises under Section 761 of the Revised Statutes of the United States, regarding *habeas corpus,* requiring the Court to "dispose of the party as law and justice require." This necessarily requires the Court itself to decide whether the immigrant is or is not admissible, and not to merely remand him for the determination of the question by immigration authorities, naturally prejudiced against him by their prior adverse ruling.

POINT VI.

The orders of the lower court should be reversed and petitioners discharged.

Respectfully submitted,

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ABRAM I. ELKUS,
RALPH BARNETT,
MORRIS JABLOW,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

ALI GEGIOW AND SABAS ZARIKOEW, petitioners,
v.
BYRON H. UHL, ACTING COMMISSIONER of Immigration of the Port of New York. } No. 801.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT.

Petitioners, and 12 other aliens, after a full hearing before a board of special inquiry, were denied admission to the country because the board found they were persons likely to become public charges. They appealed to the Secretary of Labor, who affirmed the order of exclusion (R. 14 and 26). They thereupon presented, collectively, a petition for a writ of habeas corpus, alleging as the ground of unlawful detention that there was no evidence to sustain the finding of the board (R. 4). The writ

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issued and the return thereto, in addition to setting up the grounds of detention, included a transcript of the proceedings had before the immigration authorities (R. 8 et seq.). The writ was dismissed, the trial court finding that there was no irregularity in the executive proceedings. The court also stated (R. 43):

> These immigrants are apparently unskilled laborers, speaking no language except their own, unintelligible to other Russians, have very little money; there is no one in this country legally liable to support them.

The judgment was thereafter reviewed and affirmed on appeal by the Circuit Court of Appeals (R. 55; 215 Fed. 573). That court held there was evidence to support the executive finding. A motion for rehearing was denied (R. 63).

Petitioners attempt to invoke the jurisdiction of this court on certiorari, upon the ground that a question "of very great importance" is involved. Their contention that there is no evidence is bedded upon the claim that the board of special inquiry unlawfully acted upon alleged newspaper reports showing that industrial conditions in and around Portland, Oregon, the point of destination of the aliens, were such that the aliens, if admitted, were not likely to find employment and would, therefore, become public charges. It is plain that this contention, even if true, would not constitute a proper ground for certiorari. *United States* v. *Rimer*, 220 U. S. 547; *Fields* v. *United States*, 205 U. S. 292, 296; *Lau Ow Bew, Petitioner*, 141 U. S. 583.

ARGUMENT.

I.

At the hearing before the board of special inquiry Ali Gegiow, one of the petitioners, testified that he was a farm laborer, never before in the United States; that he had $40 in money and a ticket to Portland, Oregon; that he was going to an uncle who had been three years in Portland and was engaged in digging ditches; that he had received a letter from him two months previously merely stating he was doing well (R. 14).

Sabas Zarikoew testified that he was a farm laborer, never before in the United States; that he has no relatives in this country; that he had $25 in money and ticket to Portland; that he had no assurance of work but felt he would find work (R. 20).

With this evidence and that derived by the board from a personal inspection of the aliens, and their manner of testifying, it would be impossible for any court to conclude that there was no evidence to support the order of exclusion. Whether an alien is likely to become a public charge depends quite as much, if not more, upon his appearance and the manner in which he conducts himself before the board, as upon what he states concerning his qualifications to care for himself after entry. *Goncaloes* v. *Williams*, 204 Fed. 846; *Buccino* v. *Williams*, 190 Fed. 897. At most, petitioners' contentions go no further than showing that the board reached a wrong conclusion, but this would not justify judicial interference. *Chin Yow* v. *United States*, 208 U. S. 8, 13.

II.

Petitioners' attack upon the action of the board in considering press reports as to industrial conditions in and around Portland (although such reports were not produced in evidence) appears to have been satisfactorily disposed of by the court of appeals in the following language (R. 57):

> The board was also enabled from information derived from the press and other sources to determine the likelihood of the relators securing employment when they reached Portland and they were justified in finding that conditions there were such that the chance of employment was most unlikely. It is true that information in this form would not be permitted in a court of law, but the immigration officers can not delay these proceedings indefinitely. They can not summon witnesses from the Pacific States or send commissions there. If they were satisfied from information received that there was no market in Portland for such services as these relators could render, they were justified in acting upon such information, just as they would be if satisfied from reports in the press or from any reliable source that Portland had been destroyed by flood or fire or that an epidemic of cholera was raging there. Congress has placed the determination of these questions in the hands of trained officials and their conclusions upon disputed questions of fact are final and conclusive. It is only in the very rare instance that a finding is without any proof to support it that the courts may interfere.

Moreover, the aliens were advised during the hearing of the possession by the immigration authorities of "information that there is a large number of laborers out of employment in Portland," and were also informed at the conclusion of the hearing of the reliance of the board upon "recent employment reports of industrial conditions at Portland and vicinity" (R. 17, 18, and 26), but it does not appear from the record that they sought to rebut such reports, or that they complained, then, or on appeal to the Secretary, that the reports had not been exhibited to them. They can not be permitted to reserve the point as a ground for appealing to the courts. *United States* v. *Sing Tuck*, 194 U. S. 161, 170.

That the consideration of such reports and the failure of the immigration officers to actually produce them at the hearing do not justify judicial interference, seems amply supported by *Low Wah Suey* v. *Backus*, 225 U. S. 460, 471, and *White* v. *Gregory* 213 Fed. 768 (C. C. A. 9th Cir.). This latter case is directly in point.

The petition should be denied.

JOHN W. DAVIS,
Solicitor General.
WILLIAM WALLACE, JR.,
Assistant Attorney General.

FEBRUARY, 1915.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

ALI GEGIOW AND SABAS ZARIKOEW, petitioners,
v.
BYRON H. UHL, ACTING COMMISSIONER OF immigration at the port of New York.
No. 801.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE.

Comes now the Solicitor General and moves the court to advance the above-entitled cause for hearing on a day convenient to the court at the next October term.

The petitioners, immigrants from a remote Province of Russia, arrived, together with 12 other aliens, at the port of New York on February 5, 1914. Examination before a Board of Special Inquiry disclosed that they arrived here with very little money; that they were bound for Portland, Oreg., where the reports of industrial conditions showed that it would be impossible for them to obtain employment, and that they had no one here legally obligated to assist them; whereupon the board ordered them excluded

on the ground that they were likely to become public charges. Upon appeal to the Secretary of Labor, the action of the Board was affirmed and the aliens ordered deported. Petition was then made for a writ of *habeas corpus* upon the ground, among others, that the action of the Board was illegal because of the absence of *any* evidence sustaining or tending to sustain such finding or determination.

The District Court held that as the Immigration Act left to the board and to the Secretary the determination of the question whether or not aliens shall be admitted, and as there was no irregularity in these proceedings, the petition for a writ of *habeas corpus* must be dismissed, which judgment was affirmed by the Circuit Court of Appeals (215 Fed. 573). A petition for a rehearing was denied. This court, at the present term, granted a writ of certiorari.

The petitioners have been admitted to bail pending the determination of the case in this court. As the aliens have been ordered excluded, an early hearing is advisable in order that the prompt and summary execution of the immigration laws contemplated by Congress may be had.

Notice of this motion has been served upon opposing counsel.

JOHN W. DAVIS,
Solicitor General.

APRIL, 1915.

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SUPREME COURT OF THE UNITED STATES

No. 340

ALI GEGIOW and SARAS ZARKOFF,

Petitioners,

vs.

BYRON H. UHL, as Acting Commissioner of Immigration at the Port of New York,

Respondent.

Brief for Petitioners

Max J. Kohler,
Joseph P. Chase,
Ralph Bakaleinikoff,
Meyer Jaffray,
Of Counsel.

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Supreme Court of the United States

ALI GEGIOW and SABAS ZARIKOEW, Petitioners, vs. BYRON H. UHL, as Acting Commissioner of Immigration at the Port of New York, Respondent.	No. 340.

BRIEF FOR PETITIONERS.

This is a hearing on a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted by this Court on March 10th, 1915 (fols. 66-7) for the purpose of reviewing before this Court the proceedings of said Court (215 F. R., 573 C. C. A), in affirming an order and decree of the United States District Court for the Southern District of New York, made by Judge Lacombe (Transcript of Record, fols. 45-6), dismissing a writ of habeas corpus herein, and remanding the two petitioners (and twelve others) to the custody of respondent for exclusion and deportation from the United States (Transcript, fol 61), Judge Ward dissenting (fols. 59-61), from the decision of Judges Coxe and Rogers (fols. 55-8). The case is of great importance, and involves the rights of thousands of immigrants, it being the first case reported which has involved the right of the immigration authorities to assume controverted facts, without proof, on the

theory of judicial notice, they here relating to supposed industrial conditions, as bearing on the probability of immigrants becoming public charges under the Immigration Laws, and after assuming such facts to exist (which even courts could not notice judicially, in view of their ever varying, uncertain, complicated, and indefinite character and remoteness as to place of occurrence), to deport otherwise admissible aliens on the strength of them, when even the intention of noticing such facts judicially was not called to the attention of the aliens, and they were thereby deprived of an opportunity even of meeting them by proof, and when the aliens in fact contended in court that such facts did not in truth exist. There are no limits to administrative authority to exclude aliens, by thus assuming unproven and controverted facts, if this determination will be permitted to stand. It also involves the proposition, urged by Judge Lacombe in the District Court (fols. 43-4), that the Courts are powerless to review a decision excluding an immigrant, even for the purpose of ascertaining whether there is *any* evidence to sustain exclusion, though the great weight of authority is to the contrary.

Statement of Facts.

The two petitioners above named, together with a number of others, twenty in all, fourteen of whom joined in said habeas corpus proceedings, arrived at the port of New York, by the Steamship "Czar" of the Russian-American Line on February 5th, 1914, from Ansorowo, Caucasia, in the southeastern section of European Russia, all bound to Portland, Oregon (fols. 3, *et seq.*). Only the two petitioners applied for the writ of certiorari, the others having all been deported, and the facts concerning them being different. Petitioner Ali Gegiow (fols. 14-

16), is twenty-one years of age, comes from Ansorowo, Russia, is in good health, single, able to read and write, paid his own passage out of his own money and is a farm laborer by occupation, and was never in the United States before. He testified without contradiction, that he was going to an uncle, living at Portland, who has been there three years. Said relator had $40.00 in money on landing, and a railroad ticket to Portland. He testified that his uncle wrote to him about two months previously, mentioning that he is doing well, digging ditches at Portland, and informing him that he would support him, if necessary, till he secured work, and would find work for him, but he had not secured any work for him before landing (and of course could not lawfully do so, in view of our Contract Labor Laws) (fols. 14-16).

Appellant Sabas Zarikoew is similarly situated, except that he cannot read or write, and stated that he was going merely to a friend in Portland ready to help him; he had $25.00 in cash (fols. 20-1). (All these facts were uncontradicted and undisputed.)

In excluding them the Board of Special Inquiry said (fol. 26):

> "The board is unanimous in the opinion that these aliens are persons likely to become a public charge for the following among other reasons: They arrive here with very little money, and *in view of the recent employment reports of industrial conditions at Portland and vicinity*, the board believes it would be impossible for them to obtain employment at manual labor. The money in their possession is insufficient to meet their requirements until such time as they might hope to obtain employment. They have no one here legally obligated to assist them in case of need. Two of the aliens (other than these two relators) have wives and dependent families in their native country. If admitted, there is a likelihood

of their becoming a public charge. Excluded and ordered deported."

All of the relators are Russian Ossetes or Kabardinians (fols. 14, 27, 32, 39), and were personally before the Board of Special Inquiry, and were seen by the members of the Board and examined by them through an interpreter, with Ali Gegiow as intermediary interpreter, as the others spoke a dialect unfamiliar to the Government interpreters (Respondent reports, fol. 38); but no notation of any physical, medical or mental defect was made on the records, or was justified, all being young, strong and in excellent health, except in the case of six aliens who were not parties to the habeas corpus proceedings, nor did the Government physicians certify to any defects (fols. 27-8, compare fol. 38).

No testimony, publication or report, concerning the alleged labor conditions at Portland, Oregon, or vicinity, was received in evidence before the Board of Special Inquiry, nor was any referred to in its examination of the two appellants. The alien, Sabas Zarikeow, was not notified until the decision of his case, by the Board of Special Inquiry, that the Board proposed to take notice of said alleged conditions. Some of the other aliens, other than the petitioners, were later vaguely so apprised (fols. 17, 18, 26, 31, 37), and petitioner Ali Gegiow (who speaks Russian also), *after* his case was first heard, acted as interpreter, between these aliens and the Government interpreter but he was not notified of an intention to consider said unproven facts, in the determination of his own case. In a letter to the Immigration Bureau, transmitting the records on the appeals (fol. 28), respondent acting commissioner reported *that the information in question was contained "in the daily press of recent date,"* and is to the effect that "industrial conditions in the northwest, especially in the vicinity of Portland, Oregon, are very bad," but no newspaper or other pub-

lication concerning said alleged industrial conditions was produced at the hearing, nor accompanied the record on the appeal to the Secretary of Labor, nor was it further referred to, nor was any offered in evidence in the District Court, nor specifically identified there as a basis for judicial notice, though relators' petition and traverse specifically denied that reports of industrial conditions were as alleged or render it impossible for relators to obtain employment (fols. 4, 5, 6, 41-2).

Relators in their petition for the issuance of the writ of habeas corpus in the United States District Court for the Southern District of New York, alleged that they were debarred from landing by orders of exclusion, under the circumstances set forth, which they contended established a violation of due process of law under the United States Constitution and the Immigration law, and the orders were without any evidence to support them (fols. 4, 5, 6), and after their exclusion by the Board of Special Inquiry as aliens likely to become a public charge under the Immigration Laws, they had concededly appealed to the Secretary of Labor, but the appeal was dismissed (fols. 4, 9-10, 12-13, 40). Respondent attached to his return to the writ (fols. 14 *et seq.*) the testimony taken by said Board of Special Inquiry as to all fourteen relators, who had joined in one petition for habeas corpus. This confusing joinder of the fourteen cases in one record led to some confusion and mistake in considering the facts in the decision in the Circuit Court of Appeals.

On the 14th day of May, 1914, the Circuit Court of Appeals filed opinions, and an order affirming the said order of the District Court, Judge Ward dissenting (fols. 55-61). Afterwards, on the 11th day of June, 1914, two of the appellants-petitioners, Ali Gegiow and Sabas Zarikoew, made a motion for a

rehearing of the appeal as regards them, and also requested that certain questions of law arising in the cause should be certified to this Court for its determination, but these motions were denied October 15th, 1914 (fols. 63-4). The contentions here made were advanced fully on behalf of petitioners below. The petitions for rehearing and for this writ of certiorari were and are submitted only on behalf of the two petitioners named, who are out on bail with the consent of the Government.

Questions Involved.

In the Circuit Court of Appeals on the petition for rehearing, counsel for the Government joined with counsel for petitioners in phrasing questions of law arising, applicable to the relators, as follows:

(1) Where an alien is excluded by a Board of Special Inquiry as being a member of the classes excluded by the Immigration Act, and the excluding decision was affirmed by the Secretary of Labor, if a fair, though summary hearing was not denied to the alien, is the action of the immigration authorities reviewable by the United States District Court in habeas corpus proceedings to determine whether there was *any* evidence to justify the finding of the executive authorities?

(2) When an alien is excluded by the immigration authorities on the ground that he is likely to become a public charge, and the Board of Special Inquiry, in passing upon his case, considered alleged newspaper reports as to many people being out of employment in the distant locality to which the alien is bound, as indicating that he was not likely to obtain work there, which newspaper was not identified, produced nor verified at the hearing, nor made a part of the record

of the proceedings on appeal to the Secretary of Labor, nor any testimony as to said alleged conditions was given, are the rights of the alien immigrant violated under the fifth amendment of the Federal Constitution, forbidding deprivation of liberty or property without due process of law, or under Section 25 of the Immigration Act of February 20, 1907, requiring the Boards of Special Inquiry to "keep a complete permanent record of their proceedings, and of all such *testimony* as may be produced before them," and requiring the Secretary on appeal to determine applications to enter "solely upon the evidence adduced before the Board of Special Inquiry."

(3) Are the rights of the alien violated under the facts assumed in question No. 2, where the Board of Special Inquiry did not apprise the alien, until after his rejection, that it intended to take into account in deciding his case, such alleged economic conditions?

Also (4) the further question arises as to the right of immigration authorities to consider alleged industrial conditions in the place to which the alien is bound, in their supposed relations to the aliens' likelihood to become a public charge.

Concerning the first of these questions, petitioners of course do not concede that they were accorded "a fair, though summary hearing," and the second and third questions suggested above, in fact, affirmatively indicate that a denial of due process of law and even of the forms of a legal hearing, are involved. The question is whether the act of an administrative board, in noticing facts judicially without proof, which it is urged it has no right to notice judicially, and assuming them to be true, contrary to the actual facts, is no violation of "fairness and due process of law"; also, whether such board can notice such facts judicially,

which are capable of being rebutted by evidence, without even announcing, before the close of the hearing, its intention to assume such facts, so as to enable the alien to introduce proof in opposition. As Prof. Thayer well said in his work on Evidence (p. 309) as to judicial notice: "This function is indeed a delicate one; if it is too loosely or ignorantly exercised, it may annul the principles of evidence and even of substantive law." (a) But, viewing the question for the moment merely, as one involving the right on habeas corpus, to review an excluding decision under the immigration laws, if the Federal Court determines that there is *no* evidence to justify the exclusion, we find that in the present case, Judge Lacombe, in the District Court, denied such authority (fols. 43-4), while Judge Ward on the appeal expressly affirmed it, in the light of this Court's decisions (fols. 59-60), and the majority of the Circuit Court of Appeals, though in this respect agreeing with Judge Ward, held that there was here *some* evidence justifying exclusion, particularly in the light of the matter noticed judicially without proof by the immigration authorities (fols. 56-7).

(b) Immigrants are, of course, entitled under the 5th amendment to the Federal Constitution, and under the Immigration Law, as well as commonly under our treaties with foreign countries, to due process of law and to a fair and orderly hearing in the determination of their applications to enter. *Such uncertain, complex, every-varying facts, changing constantly in point of time, and differing at the same time as to different lines of industry, and relating to a distant place, as labor conditions in their relation to a particular person's being able to get employment in his specialty or any other line, cannot be noticed judicially by the Courts, even, much less, by badly edu-*

cated and weak Immigration Inspectors, drawing only $1,800 per annum salary, whose incompetency has just been emphasized by the national Immigration Commission.

Alleged newspaper reports, not even produced or identified, are not proper sources upon which to predicate judicial notice of facts, particularly where the facts are controverted, and even their alleged publication in the newspapers is controverted, and the case differs materially from important well-known occurrences which everybody knows, like the San Francisco earthquake, or the raging of cholera, referred to in Judge Coxe's opinion below (fol. 57). It was incumbent upon respondent to have adduced at least the alleged newspaper reports in question, whose existence was controverted by the traverse to the petition (fol. 42,) not merely because of the rule requiring a party to produce evidence peculiarly within his own possession (*Selma R. Co. vs. U. S.*, 139 U. S., 560, 567; *Peo. vs. Nyce*, 34 Hun, 298) but also under the procedure applicable to allegations in petition and traverse not met by the return, in habeas corpus proceedings (*Kohl vs. Lehlback*, 160 U. S., 293, 296).

(c) *Even as to matters that may be noticed judicially, orderly procedure and due process of law require a request in the course of the trial, to notice them judicially, and announcement of intention to do so, especially as regards controvertible matter, so that the adverse party may know what he has to meet and can adduce evidence to meet it.*

(d) *It should also be noticed that neither of the petitioners was questioned by the inspectors as to what resources, other than the money shown the immigration authorities, he had, either here or abroad, so that there is no right to assume that they could not have secured additional cash, if desired, from their own resources.*

(e) Petitioners, Ossetes and Kabardinians, come from the southeastern section of European Russia, in the neighborhood of the Caucasus Mountains, and have an Aryan language and literature of their own, and are a vigorous and chiefly agricultural people (Ency. Britannica, 11th Ed., V. Article, "Caucasia," especially pp. 546, 548; also I, 469; "Kabardia" XV, 619, XXIII, 874 and VIII, 197; *Immigration Commission Reports,* Vol. 5, pp. 33-8, 102. *Efrom Brockhaus'* Russian Encyclopedia, Vol. 22, p. 263). In fact Dr. K. S. Kennard, while a government physician at Ellis Island, wrote a scientific paper on "The Racial Derivation of the Ossetes," in 1907, doubtless induced to do so by his examination of a group of seven Ossetes on arriving at Ellis Island three years previously, whose fine physique he comments on (American Anthropologist, Vol. 9, pp. 276-86, 650-2), so that it is apparent that they have been migrating here for some years, though in numbers only for about the last three years, with Oregon as their nucleus of settlement. It is interesting to note in Special Immigrant Inspector W. W. Husband's report on his special investigation of "Russian Peasant Immigration" in the Annual Report of the Commissioner General of Immigration for the year ending June 30, 1914 (p. 391, at pp. 399-402), that the department deems such new "Russian Peasant Immigration" one which "it would seem wise that every effort be made to utilize * * * in a way that will be most advantageous to the United States," and that "they are accustomed to agricultural labor under adverse circumstances, which kind of labor would seem to be required in the development of much of the so-called waste land in the United States."

(f) Of course, the fact that the cases of two groups of these immigrants (fols. 31, 37), decided by the Board some days after those of these two petitioners

(fol. 26), were included in the same return to the writ of habeas corpus [redacted], does not make the proceedings in these later cases applicable to petitioners (though similar), and in fact, even the circumstance that the Board of Special Inquiry improperly decided some eleven cases together, after trying each separately, including those of the two petitioners (fols. 14-27), does not affect any immigrant by the evidence taken in the cases of the others, though such course was improper and unauthorized, and led to confusion everywhere (Compare Toy Tong vs. U. S., 146 F. R., 343, 344, C. C. A.; Brown vs. Spofford, 95 U. S., 474; Moore vs. Forsanth Co., 38 S. C., 319, 326; Ferrett vs. Atwell, 1 Blatchf., 151; Davis vs. St. Louis R. Co., 25 F. R., 786.

Some Incidental Comments on the C. C. A. Opinion.

The circumstances that records covering fourteen different aliens were jumbled together in one return, and that the immigration authorities and the courts attempted, as seen, to take judicial notice of controverted, ever-varying, industrial conditions, are responsible for a number of erroneous statements of fact, unwarranted as to these two petitioners, in the opinion of the majority of the Circuit Court of Appeals. It was there erroneously assumed (a) that petitioners know no trade (fol. 56); (b) speak no language understood in this country (fol. 56), and (c) that unfavorable industrial conditions made it unlikely that they would find employment here (fols. 56, 57), there being, (d) no one here legally obligated to support them (fol. 56). (a) In fact, however, it is established and is undisputed that both of the petitioners are farm laborers (fols. 15, 20). In fact, farm laborers are so badly wanted here, and are such a crying need,

and particularly in the sparsely settled west, whither these men were bound, and where they are now working, that the Government itself, though the "Information Division," in the Bureau of Immigration, established under Sec. 40 of the Immigration Act, quickly finds positions for them, and Secretary Nagel publicly advocated exempting farm laborers from our Contract Labor Laws, so that more would come over (see printed Report of Commissioner General of Immigration for year ending June 30, 1914, containing report of Mr. Powderly as Chief of the Information Division [pp. 159-186, especially 172-4], and "Proceedings of the Conference of State Immigration, Land and Labor Officials with representatives of the Division of Information, Bureau of Immigration, Nov. 16th and 17th, 1911," published by the department as a public document under the title "Distribution of Admitted Aliens and other Residents," especially pages 26-7). Secretary Wilson has taken a similar stand with regard to distributing farm laborers, as has also Commissioner General Camminetti.

(b) As to petitioners' supposed inability to speak or write any language spoken here, petitioner Ali Gegiow is the very one whom Judge Coxe later expressly excepted (fol. 57), as he is conversant with Russian, and even aided the Government interpreters in interpreting for the other aliens (fols. 14, 28). Moreover, in view of the testimony that Ali Gegiow was going to an uncle at Portland, with whom he was in correspondence, and who had promised to help him in finding work (fol. 15), and similar connections of blood or race on the part of the other relator, it is obvious that Judge Coxe's statement is at least an exaggeration, to the effect that "no one of the immigrants can speak * * * any language that is understood in this country" (fol. 56). In fact, as stated in respondent's letters of

recommendation to the secretary, which accompanied these records on the appeal, petitioners are "Russian (Ossetin) Kabardinians" (fols. 27, 14; compare fols. 32, 39). Instead of making erroneous assumptions of fact regarding this race, the Court should know, as shown by the immigration records, that a couple of thousand of these Ossetes have migrated to the United States during the past few years, making Portland, Oregon, their headquarters, and working in that vicinity as farm laborers, and have freely conversed in that vicinity with each other, and liberally aided each other, and succeeded in their new homes. (See *ante*, p. 10.)

The fact that Portland has been the nucleus for this whole migration was overlooked by respondent in his letter of transmittal of some of the appeals, other than petitioners,' and he accordingly suggested that from this common destination he suspected that these aliens were coming over together in violation of the contract labor laws, while conceding that the evidence did not establish this suspicion (fol. 39), as also that the Board of Special Inquiry did not exclude for any such reason (fol. 31).

So also, if any one should be so rash as to suggest that unfamiliarity with English is apt to tend to make an immigrant a public charge, such assumption might readily be thrust aside, if only in view of the fact, stated by Prof. Wm. Z. Ripley, in writing, on "Races in the United States" (Atlantic Monthly, Dec., 1908, p. 745), on the authority of George Bancroft's History (Vol. VII, p. 335), that already at the time of the Revolution "one-fifth of our population could not speak English and that one-half at least was not Anglo-Saxon by descent," as compared with 1,217,280 over ten years of age of our foreign-born population unable to speak English in 1900, or 12.2%, and 15.6% in 1890 (Imm. Comm. Reports, I, p. 160). Of course, an overwhelming majority of the immigrants com-

ing over now do not speak our vernacular, but eagerly avail themselves of ever-increasing opportunities for learning it here.

(c) *The fact is that these aliens are far better equipped to succeed economically here than the overwhelming majority of aliens daily admitted.* The average amount of money in the possession of immigrants on landing during the fiscal year 1913, was only $34 per person, about 151,000 having had $50 or more, as against 755,000 having less than $50 (Report of Comm. General for 1913, pp. 7, 46, 47; Report for 1914 is similar, pp. 29, 43); the Immigration Commission reported that during the period 1904-1910, only 13.9% of the immigrants admitted showed $50 or more, and that the average amount shown between 1899-1910 was only $21.57 (Reports, Vol. I, p. 103). In fact, though Congress in 1906 considered the propriety of establishing a $25 cash requirement for immigrants, even that was eliminated by the House Committee (House Report, No. 4912, dated June 11, 1906), and in the Conference Committee, and the Act of 1907, as passed, accordingly omitted the same. It is thus obvious that petitioners had appreciably *more* than the average amount of money, and none dependent on them. On the other hand the total number of persons deported during the fiscal year 1913, as having become public charges within three years after entry was only 1,262, and the total number deported for all causes was 2,019, out of an average immigration per annum for the three years involved of 971,550 (Report Comm. General for 1913, pp. 110, 111, 105), or about one-fifth of one per cent, an utterly negligible quantity. The Immigration Commission so found (Reports, I, pp. 35-6). The explanation is to be found in the fact that nearly all the immigrants are destined to join relatives or friends here, who help them in finding work and to get along

in their new surroundings; thus, out of the 1,197,892 immigrants admitted during the fiscal year 1913, there were 954,931 going to join relatives, 179,920 joining friends, and only 63,041 going to neither relatives nor friends (Commissioner's Report, pp. 46, 47; similar in 1914, p. 43). The assistance of relatives and friends in their new homes is worth immeasurably more than a few dollars or hundreds of dollars more, and comparatively few immigrants join relatives legally obligated to support them here, as the sex and age statistics further show. The trouble is that erroneous views have recently arisen at Ellis Island, as to the *negligible* character of offers of assistance to aliens, when coming from persons not legally obligated to assist the aliens. This view is inconsistent with the able opinion of Judge Brown in *In re Day*, 27 Fed. Rep., 678, 681, which was recently adopted as authoritative by the Department of Commerce and Labor in an able opinion, and the lower court was misled by the emphasis placed by the immigration authorities on the necessity for an obligatory character for proffers of assistance of relatives and friends (Record, fol. 26), thus *ignoring* the important and generous assistance of those under no legal obligation. (See also *post* p. 46).

The majority opinion below emphasizes the fact that hearings in immigration cases must "be swift and summary," and that "the formality of court proceedings cannot be required" (fol. 56). In fact, the Court says (fol. 57): "No immigration act could be enforced which requires all these facts to be established with the same formality and certainty which is required in the courts," and that "information in this form" of the industrial conditions which were noticed without proof "would not be permitted in a court of law, but the immigration officers cannot delay these proceedings indefinitely. They cannot summon witnesses from the Pacific states or send commissions

there." That all formal judicial requirements with regard to trials and modes of proof do not apply to administrative tribunals has, of course, been repeatedly held by the courts, but it is submitted that, while the admission of incompetent testimony may not justify a reversal, this cannot be the excuse for dispensing with requiring some competent, necessary sworn testimony, nor for disregarding even the fundamental principles inhering in due process of law in administrative hearings, such as opportunity to acquire knowledge of the evidence and production of the reports relied upon and opportunity to meet the same. The immigration authorities have gotten along very well for many years without resorting to such attempts to assume without proofs, controverted facts—of which even courts cannot take judicial notice—and of even concealing their intention to assume the same from the immigrant, thus depriving him of an opportunity of meeting the controverted matter in question. The immigration laws have been construed ever more rigidly despite the increasing number of exclusions abroad before embarkation, and there is no need whatsoever for assuming, as the lower court did, that boards of special inquiry must be permitted, in order to perform their duties, to assume unsworn, unproven, controverted facts, such as even courts may not notice judicially.

So also, apparently, the majority opinion below (fol. 56), in emphasizing the fact that these aliens were "not employed and no actual promise of employment had been given them," overlooks the fact that such arrangements are forbidden by our contract labor laws, so that this is the situation in which all admissible immigrants find themselves on arrival. In view of the facts hereinbefore pointed out, showing the experiences of the overwhelming majority of immigrants coming over here, who are much less favor-

ably situated than these petitioners, the inquiry in the opinion below as to how long these immigrants could probably exist after reaching Portland before becoming public charges, should under all probabilities be answered "all their lifetime," in view of the factors ignored by the Court, instead of justifying an inference of probability at an early date of becoming public charges.

POINT I.

Alien immigrants are entitled to due process of law under the Federal Constitution (5th Amendment), and under Sec. 25 of the Immigration Law, and generally under our treaties with foreign countries, and a denial of due process of law arises from a denial of a proper hearing, and undisclosed assumption of controverted facts and denial of opportunity to meet them, and grave irregularities on the hearing of the appeal thereon, as also where there is no competent evidence whatsoever justifying an exclusion.

(I) *(1) The right to due process of law under the 5th Amendment in immigration cases is of course well established, and, as further urged hereafter, this forbids unlawfully assuming facts, not cognizable on the*

theory of judicial notice, and also deciding a case on such undisclosed facts without giving the immigrant notice of such intention or an opportunity to meet such matter by proof.

Chin Yow vs. U. S., 208 U. S., 8.
The Japanese Immigrant Case, 189 U. S., 86, 100.
In re Con Pon, 168 F. R., 479, C. C. A. (*post*, pp. 27-8).
Davies vs. Manolis, 179 F. R., 818 (C. C. A.)
U. S. vs. Sibray, 178 F. R., 144, 149.
Hanges vs. Whitfield, 209 F. R., 675; aff., 222 F. R., 745.
Rodgers vs. U. S., 152 F. R., 346, C. C. A.
In re Monaco, 86 F. R., 117.
In re Gottfried, 86 F. R., 9.
Roux vs. Commissioner, 203 F. R., 413.
Ex p. Petkos, 212 F. R., 275; Mod., 214 F. R., 978.
In re Kornmehl, 87 F. R., 314 (Illegal Regulations).
In re Ung King Ieng, 213 F. R., 119.
Ex p. Wong Tuey Hing, 213 F. R., 112.

See also:

Interstate Comm. Comm. vs. L. & N. R. R. Co., 227 U. S., 88, 91, 93 (quoted pp. 60-2).
U. S. vs. 1500 Bales of Cotton, 27 F. C., 15958.
Thayer on Evidence, pp. 309-10.

The right to due process of law, as applied to an alien's right to enter and remain, was specifically recognized already in Magna Charta, which provided (Ch. 30):

> "*All foreign merchants* (mercatores), (if they were not openly prohibited before) *shall have their safe and sure conduct* to depart out of England, *to come into England, to tarry in and go through England*, as well by land as by water, to buy and sell without any manner of evil tolls, by the old rightful customs, except in time of war."

Of course in those days, there were not apt to be any but "merchants," coming into England from abroad, so that the provision was intended to apply to all foreigners, and in fact Hale says in his "Pleas of the Crown" (I., p. 93, Am. Edition of 1847):

> "The statute speaks indeed of *mercatores*, but under that name all foreigners living or trading here are comprised."

Our treaties with England and Italy (Treaties in Force in 1898, pp. 216, 310), for instance, assure due process on applications of their subjects to enter.

Said this Court in the leading case of *The Japanese Immigrant Case*, 189 U. S., 86, 100-101:

> *"But this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law,' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect to the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.* Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon

> the questions involving his right to be and remain in the United States. *No such arbitrary power can exist where the principles involved in due process of law are recognized.*
>
> "This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. *In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution.* An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellant."

It will be observed that this Court was called upon in that case to pass on the constitutional restraints imposed upon such immigration hearings, because the deportation statutes there involved (quoted there page 96) contained no procedure clause. Yet, in order to render the Act constitutional, provisions for a hearing and opportunity to defend were implied, and this case, involving one concededly an alien, therefore recognized the inherent constitutional restraints upon immigration tribunals. *In our case, we are dealing, moreover, with the express provisions of Sec. 25, of the Act of 1907, providing:*

> *"All hearings before boards shall be separate and apart from the public but the said boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them.. Such decision (on appeal to the Secretary) shall be rendered solely upon the evidence adduced before the board of special inquiry."*

In *Chin Yow vs. U. S.*, 208 U. S., 8, this Court held that constitutional right and due process of law were violated, even in a Chinese case, where the inspector refused to take the competent testimony offered by the immigrant, and the Court took jurisdiction to redress the wrong alleged, by which

> *"petitioner arbitrarily was denied such a hearing and such an opportunity to prove his right to enter the country as the statute meant that he should have.* If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. * * * But supposing that it could be shown to the satisfaction of the District Judge that the petitioner had been allowed nothing but the semblance of a hearing. * * * The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form."

The violation of this constitutional right was the basis there for the direct appeal from the District Court to the Supreme Court.

See also *Whitfield vs. Hanges*, 222 F. R., 745, C. C. A, quoted *post*, pages 52-5, and Interstate Com. Com. vs. L. & N. R. R., 227 U. S., 83, quoted *post*, pages 60-2, as to denial of constitutional due process of law in administrative hearings through making orders based, in part, on *ex parte* and undisclosed investigations of facts.

In *Davies vs. Manolis*, 179 F. R., 818 (C. C. A., 7th C.), appellant was proceeded against for deportation, and after the hearing was closed, other additional evidence was taken in his absence and without notice to him, and the Secretary ordered deportation. Said the Circuit Court of Appeals:

> *"Whatever were the subsequent proceedings or conclusions in the department, they were*

> *ex parte, and the* final orders for re-arrest *were without hearing* and *unauthorized.* In such case the petitioner-appellee was entitled to a writ of *habeas corpus,* as he was arbitrarily denied such hearing and such opportunity to prove his right to enter this country as the statute meant that he should have (*Chin Yow vs. U. S.,* 208 U. S., 8)."

In *Hanges vs. Whitfield,* 209 F. R., 675, deportation proceedings were reviewed, where the inspector refused to recall for cross-examination, witnesses under his control whose testimony the Government had previously taken *ex parte,* and when some were produced by relator, they refused to testify, unless he requested them to, which he declined to do. This was held to be a denial of due process of law, the Court saying:

> "The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact; and it is indispensable in all judicial proceedings in this country, civil or criminal, that *ex parte testimony, even though given under the solemnity of a legal oath or affirmation that it is true, taken in the absence of and without opportunity at some stage of the proceedings to the party against whom it is proposed to be used to cross-examine the witnesses giving such testimony, cannot rightly be used against him* (1 Greenl. Ev. [16th Ed.], Sec. 447; 2 Wigmore on Ev., Secs., 1361, 1365; Interstate Commerce Commission vs. Louisville & N. R. Co., 227 U. S., 88, 93; 33 Sup. Ct., 185; 57 L. Ed., 431). * * *
>
> *"They were thus prevented from obtaining their testimony* either upon direct or cross-examination. True, the petitioners and their counsel were permitted to examine the record, or copy of the testimony taken by the inspector prior to the application for the warrant of ar-

rest; but of what avail was that? *That testimony had already been forwarded to the Bureau of Immigration, and an inspection of the record kept by the Inspector would only enable them to read what he had written, without opportunity to test its truthfulness by legitimate cross-examination or otherwise. That such testimony is legally admissible in any proceeding in which it is sought to deprive a person, citizen, or alien of his personal or property rights, cannot be successfully maintained.* * * *

"The Immigration Act and the rules prescribed thereunder evince the purpose to afford an alien a fair opportunity to test the truth of the evidence adduced against him, and to disprove it, if he can legally do so. If rule 22, properly interpreted, denies the aliens this right, then it is one not authorized by the Immigration Act. * * *

"Any action of the inspector which results in the denial to the alien of a substantial right to which he is lawfully entitled is unauthorized and cannot rightfully be upheld.

"The conclusion is unavoidable, under the testimony in this case, that the hearing before the Inspector (who acted as prosecutor and judge upon such hearing), has not the semblance of a fair hearing."

This holding was just affirmed in 222 F. R., 745, C. C. A., quoted *post*, pages 52-5.

In *Rodgers vs. U. S.*, 152 F. R., 346 (C. C. A., 3rd Circ.), in considering alleged irregularities on the part of the Board of Special Inquiry, as authorizing judicial review by means of *habeas*, of an application to enter, the Court held that even the failure of the board's record to show that the immigrant was advised of his right to appeal to the Secretary, before a regulation affirmatively required such notice to be given, authorized judicial review. The Court said that the record

> *"nowhere discloses, expressly or by implication, that Buchsbaum was informed that he had a right of appeal from the decision of the board. If he had been so informed, it would have been the duty of the board to cause the fact to be entered of record in the minutes of the board's proceedings.* The action of the authorities in thus sending Buchsbaum from the port of Boston without informing him of his right of appeal was irregular and unlawful. Practically and in legal contemplation it impaired or deprived him of that right. * * * The withholding of such right from the alien of itself precludes finality in the decision."

In line with this, Judge Lacombe held in *In re Monaco*, 86 F. R., 117, that an office rule of the department, preventing forwarding the papers on appeal to the secretary, required judicial review of the application to enter, and in *In re Gottfried*, 89 F. R., 9, Judge Butler held that a decision on appeal against the immigrant, rendered on the appeal of a dissenting member of the board without notice to the immigrant is a nullity, saying:

> *"If the petitioner had been given notice, and an opportunity to defend, the situation would be materially different. As it is, his right to be heard by the bureau has been disregarded.* That the decision of the board should have been reversed on the representations of a dissenting member, and the order issued without notice to the petitioner is, to say the least, astonishing." *Habeas* entertained.

In *In re Gin Fung*, 89 F. R., 153, the Court said:

> *"But can it be said that there has been a hearing or a decision?* On the 8th day of July, the collector heard the evidence of one witness, a white man, to the effect that the petitioner was a merchant, and as such, entitled to land. He heard no evidence contradicting this statement. *He offered no rea-*

sonable opportunity to the petitioner to prove his case, or to produce further testimony."

Even efforts of Inspectors to dissuade the immigrant from securing counsel, require judicial review:

U. S. vs. Williams, 185 F. R., 598 (Holt, J.).
Roux vs. Commissioner, 203 F. R., 413 (C. C. A., 9th C.).

In *U. S. vs. Wong Chung,* 92 F. R., 141, Coxe, J., said, in a case where defendant was excluded because the collector heard from some undisclosed source at some undisclosed time, that defendant, who claimed to be a merchant's son, was going to a laundry:

> "The action of the collector was based upon an irrelevant rumor. It would be a misnomer to call it hearsay evidence, it was no evidence at all. * * * It was conjecture only. It was the merest shadow, not the shadow of anything tangible, but 'such stuff as dreams are made of.' No man whose brain is in normal condition would regulate the most trivial affairs of life upon such information.
>
> "No witness was sworn, no statement was reduced to writing, no written decision was made and, no reason for his action was ever given by the collector to the *defendant,* who *had no opportunity to answer or explain the rumor regarding his destination.* * * * In every reported case where the decision has been upheld, some semblance of legal procedure has been observed. The courts should not, unless the language of the law is too plain to admit of doubt, throw down every barrier which the rules of the common law have erected against the encroachment of arbitrary power."

See accordingly:

In re Chinese Relator, 58 F. R., 554, Lacombe, J.

See also the able opinion of Morton, J., in

Ex. p. Petkos, 212 Fed. Rep., 275, quoted *post*, pages 50-1; mod., 214 F. R., 978, C. C. A., on other point.

(2) *It will be observed that all the cases relied upon by the Government below herein and cited in* the opinion of the Circuit Court of Appeals(fol. 58), (other than the *Nishimura Ekiu case*, 142 U. S., 651, which arose under a materially different law, and will be considered *post*, pages 31-7), *arose under the Chinese Exclusion Laws, and not under the general immigration laws. The Courts have strongly emphasized the fact that differences in the statutes render these two classes of cases inapplicable to each other, for an entirely different procedure is established by the Chinese Exclusion Laws, than is prescribed by the section of the Immigration Law* (Sec. 25), *here involved* (*Rodgers vs. U. S.*, 152 F. R., 346, 352, C. C. A.; *Gonzales vs. Williams*, 192 U. S., 1, 16). The Chinese Exclusion Laws establish no quasi-judicial board, like the Board of Special Inquiry, and were drawn on the theory that, in general, governmental certificates were to be exclusive methods of proof, and in terms threw the burden of proof on the Chinese persons, while, on the other hand, there is no such provision as in our Immigration Law, requiring the appeals to the Secretary to be heard solely on the testimony taken before the Board of Special Inquiry, and this conversely involves a right to offer new evidence on behalf of the immigrant in Chinese cases on the appeal (*U. S. vs. Sing Tuck*, 194 U. S., 161, 170). The consequence is that due process of law in Chinese cases, unlike cases of applications of immigrants in general to enter, need not necessarily require the introduction of the evidence in defendant's presence, with right to cross-examine the witnesses, for when thereafter the appeal is taken, there is a right to adduce new evidence, after seeing the full record be-

low, while in immigration cases under the general law, the appeal is expressly limited to *the evidence* adduced before the *quasi-judicial tribunal*, called a "board of special inquiry."

As was already indicated, the statutory procedure for deportation of aliens, after admission, under our general immigration laws, does not provide for a board to take testimony either, being more closely approximated to the Chinese Exclusion Law machinery, so that authorities thereunder have only a limited applicability to hearings before the boards of special inquiry. Even under the looser procedure applicable to Chinese Exclusion cases, however, such departure from "due process of law" as is here involved, has been held to authorize judicial review. Said the Circuit Court of Appeals in *In re Con Pon*, 168 F. R., 479 (9th Circ.), (which decision reversed the exclusion, where as here a material document was not forwarded to the secretary, or even identified, on the appeal, which the inspector had considered):

> *"But the applicant upon his appeal from the decision of the local officer was entitled to the benefit of all the material evidence which was before the inspector. To withhold any thereof, and to exclude it from the record on the appeal, was to deny him the right of appeal which the statute gives him.* The testimony of a witness which was on the whole favorable to the applicant's contention was by inadvertence omitted from the record on the appeal, and was not considered on the hearing thereof. It makes no difference that such evidence was taken at the instance of the inspector, and that it never came to the attention of the applicant or his counsel; it was a portion of the evidence taken by the inspector as an officer of the government, whose duty it was to act impartially and to ascertain the truth as to the question at

issue. The inspector discredited it, but the *applicant was entitled to the benefit of it on the appeal.* It is no answer to this to say that portions of the testimony of that witness tended to contradict certain statements of Look Wing. Having been denied the benefit of all the testimony taken upon the question of his right of admission to the United States, *the applicant has been deprived of the right of appeal which the statute confers upon him,* and he may, therefore, under *habeas corpus,* test the legality of his imprisonment. *In re Monaco* (C. C.), 86 Fed., 177; *United States vs. Wong Chung* (D. C.), 92 Fed., 141; *United States vs. Chin Fee* (D. C.), 94 Fed., 828; *Rodgers vs. United States,* 152 Fed., 346, 91 C. C. A., 454; *United States vs. Nakashima,* 160 Fed., 942, 87 C. C. A., 646."

The case of Tang Tung vs. Edsell, 223 U. S., 673, relied upon by the government and cited in the opinion below, also arose under the Chinese Exclusion Laws, and therefore involved no such hearing before a Board of Special Inquiry, as is provided for in Section 25, nor the limitation of that section that the appeal must be heard exclusively upon the evidence taken before the Board. This Court recognized in it, however (page 675), that

> *"if it does not affirmatively appear that the executive officers have acted in some unlawful or improper way and abused their discretion,* their finding upon the question of citizenship must be deemed to be conclusive and is not subject to review by the courts."

The chief question there involved was whether applicant had been admitted previously to the United States on an earlier trip, as alleged by him, or had been then rejected (p. 675, *et seq.*). In the course of the application, the Chinese inspector examined the official records on file to ascertain whether appli-

cant had then been rejected or admitted, and on finding that they disclosed a rejection, "the inspector properly brought this fact to the latter's attention, and asked whether he had any explanation to give" (p. 677). In connection with this inquiry, the inspector examined the official custom house files as to the arrival and sailing of vessels, and the procedure as to examining Chinese applicants at that time, and "the point of the inquiry" was disclosed on the examination of applicant's witnesses to his attorney (p. 679). Other records of Chinese persons who accompanied Tang Tung on the same steamer were also examined, to show a conflict between them and the official records, as to an endorsement of alleged admission. The Court held that the Secretary "might at all times take cognizance" of his official files (p. 681), which is merely in line with the rule applicable to Courts that on such an issue as that, ***they may take judicial notice of their own files*** (de Bearn vs. Safe Deposit Co., 233 U. S., 24, 32), and is no extension of the judicial rule as to judicial notice. Instead of treating the rule of judicial notice as one that might authorize taking judicial notice of papers, not even produced or identified, and withholding information of such intention until the case was closed, this Court shows that applicant had notice of this proof before the papers on appeal were submitted (pp. 679-680), and that even in the ***habeas corpus*** proceedings, relator did not claim that these reports were false or misleading, but stipulated that the case should be heard on the prior record, and it added (p. 680):

> "Had there been ground for saying that the inspector had misled the secretary by misrepresenting the records to which he referred, or by false assertions as to the matters of fact disclosed by the inquiries, it cannot be doubted that this would have been shown, as there was

> abundant time for full consideration and inquiry."

In our case, on the contrary, the petition in *habeas* proceedings averred that there was no evidence as to likelihood to become a public charge (fols. 4, 5, 6), and the traverse expressly denied that reports of industrial conditions were as alleged, and that the conditions were as alleged (fol. 42), and under the rules as to *habeas*, under the Federal statute (Rev. St., Sec. 754), these facts were therefore admitted by respondent, in default of proof of their correctness (Kohl vs. Lehlbach, 160 U. S., 293, 296), even apart from the rule that the burden is on a party even in a criminal case to produce evidence peculiarly within his own power (Selma R. Co. vs. U. S., 139, U. S., 560, 567; Peo. vs. Nyce, 34 Hun, 298).

That this Court did not intend to decide that the administrative officers may take judicial notice of material documents, not produced or even identified, further appears from the fact that, in the Chinese deportation case decided by it soon after, *Low Wah Suey vs. Backus*, 225 U. S., 460, 471, (also cited), it disregarded a similar objection, *solely* because the record failed to show the nature or materiality of the report claimed to have been withheld, saying:

> "It is further alleged that the executive officer acted in bad faith, and arbitrarily in receiving a report based on hearsay information, the name of the informer being withheld from Li A. Sim and no opportunity being given her to offset or disprove such hearsay evidence. *The nature and character of this testimony is not set forth*, and *we have no means of knowing it was not such as might properly have been considered in such a hearing.*"

The Government itself relied upon the Con Pon case in that case (p. 463), which this Court thus ap-

proved, but distinguished, and which had been decided in the lower courts simultaneously with the Tan Tung case (161 F. R., 618; on appeal, 168 F. R., 478, 488).

It is important to notice that this Court in that case, recognized as a ground for entertaining *habeas* proceedings in immigration cases (225 U. S., p. 468),

> *"that the action of the executive officers was such as to prevent a fair investigation."*

See also the later decision in *Int. Comm. Com. vs. L. & N. R. Co.*, quoted *post*, pp. 60-2, in which these earlier immigration case were reviewed on this point The other Chinese cases cited below (fol. 58) are also thus distinguishable.

(3) *The decision of the Court in Nishimura Ekiu vs. U. S.*, 142 U. S., 651, relied upon so much below, particularly by Judge Lacombe (fol. 44), is not now applicable, in view (a) of the marked changes in the statute since that case was decided, creating a *quasi-judicial board* required to take *testimony*, and in the direction of conferring on the physicians, and not the lay inspectors, sole jurisdiction to note and certify physical, as well as mental, defects in immigrants (*U. S. vs. Petkos*, 214 F. R., 978, C. C. A.); (b) the later decisions of this Court limiting it, especially *The Japanese Immigrant Case*, 189 U. S., 36, where it was distinguished on constitutional grounds; (c) the fact that here *unlawful procedure*, and no mere question of existence of facts, is involved; (d) because despite our statute, the record here fails to show that relators were excluded on account of anything observed by the inspectors in their appearance; and (e) because the right since established, of determining finally even rights to citizenship and other difficult questions of law and fact under the later acts in these administrative proceedings, requires closer conformity to judicial procedure as necessary "due process of law." It should also be noted that, (f) in

general immigration cases, the statute imposes the burden of proof on the Government, while in Chinese cases it is on the alien, except in the single instance of "assisted immigrants," under the general immigration laws, in which case Section 2 *expressly* throws it on the alien (26 Opinions, *Attorneys General*, 410, 414; *U. S. ex rel. Castro vs. Williams*, 203 F. R., 155, 156, Ward J.; *Rodgers vs. U. S.*, 152 F. R., 346, 352, C. C. A. See also *post*, pp. 46-7, and *Chin Bak Kan vs. U. S.*, 186 U. S., 193, 200).

(a) Material changes in the law were made by Congress since the Nishimura Ekiu case was decided, especially by the present act (Section 25), as to procedure, as contrasted with Section 8 of the Act of 1891, involved and quoted in the *Nishimura Ekiu* case. *No board, and no "hearing" before any board,* were provided for in the earlier act, no provisions for "a complete record of their proceedings and of all such *testimony* as may be produced before them," and no provision that the decision on the appeal "shall be rendered solely upon the evidence adduced before the board" (Section 25 of Act of February 20, 1907. As to definition of *"hearing,"* see Int. Comm. Com. vs. L. & N. quoted *post*, pp. 61-2.

Judge Lacombe, in the District Court herein (fol. 44), in claiming for boards of special inquiry authority "on physical inspection," to exclude aliens on the basis of their "conclusions as to their (alien) capacity to earn a living," apparently on grounds not disclosed by their records, applied the decision of this Court in the Nishimura Ekiu case, on the assumption that Sec. 8 of the Immigration Act of 1891 there involved is "substantially the same," as Sec. 25 of the subsisting Act, "except that it (the latter) substitutes a Board of Special Inquiry for a single inspector, * * * an authoritative opinion expressed in unambiguous language which seems to be fre-

quently overlooked." But the learned Judge overlooked the fact that the Immigration Law has been radically amended since 1891, not merely in the important respect of substituting a board for a single inspector, but particularly in inserting a provision requiring a regular "hearing" and providing for an appeal to the Secretary "to be heard solely on the evidence before the Board of Special Inquiry" (Section 25 of the present Act), while on the other hand, the jurisdiction of the medical officers was enlarged so as to include discovery and certification of all *physical* and mental defects, including those bearing on likelihood to become a public charge, instead of having the inspectors pass on such questions. The Act of 1891, quoted in full in the Nishimura Ekiu case, provided merely that the immigration officials were to *"inspect* all such aliens" and "the power to administer oaths and to take and consider testimony * * * all of which shall be entered of record," was held not to require inspectors to take any testimony at all, but merely to *"empower* inspectors to administer oaths and to take and consider testimony, and requires only testimony so taken to be entered of record." This was radically different than the present provision (Sec. 25 of the Act of 1907), providing a *"hearing"* before a *"board of special inquiry,"* of three persons, required to keep a complete permanent record of their proceedings and of *all such testimony as may be produced before them,"* coupled with the further provision that the appeal to the Secretary thereby authorized *"shall be rendered solely upon the evidence adduced before the board of special inquiry,"* which has repeatedly been construed, as seen, as requiring an administrative "hearing" at which all evidence relied upon shall be taken down and the complete record transmitted on the appeal to the Secretary. The single "inspecting" official now holds all persons for examination before the

board of special inquiry, who do not appear to him to be clearly and beyond a doubt, entitled to land. Nor is the change merely a verbal one. As seen, in 1891, the duty of the immigration officers was merely to "inspect" aliens, with purely permissive power to take evidence under oath, and this duty to *inspect* included consideration of apparent physical disabilities of aliens. Since then, the provision that the *"medical* examination shall be made by surgeons of the Marine Hospital Service" (Sec. 8, Act of 1891), was enlarged by Sec. 17 of the Act of March 3, 1903 (32 Stat. 1213, carried over into Sec. 17 of the present Act of 1907), requiring a *"physical* and mental examination of all arriving aliens by medical officers of the U. S. Marine Hospital Service" * * * who shall certify for the information of the immigration officers and the boards of special inquiry * * * *any and all physical and mental defects or diseases observed,"* and their medical certificates are made final by Sec. 10 on boards of special inquiry, not merely as to "loathsome or dangerous contagious diseases, but as to "any mental or *physical disability* which would bring such aliens *within any of the* classes excluded from admission," including *"likelihood to become a public charge"* (see U. S. vs. Rodgers, 182 F. R., 274; aff., 185 F. R., 334, C. C. A.).

So, also, since the Act of 1891 was passed, various other acts were passed, establishing an appropriate procedure for winnowing out the physically defective immigrants, through the action of others than the immigrant inspectors or boards of special inquiry. The Act of March 3rd, 1893 (27 Stat., 569), required masters and steamship surgeons to investigate and report, under oath, as part of the ship's manifest, before embarkation abroad, as to the ship's surgeons' "physical examination" of the immigants carried, including their belief that "no one of said passengers is

likely to become a public charge." Secs. 12, 13 and 14 of the Act of March 3, 1903 (and of the present Act of 1907), required the steamship company surgeons to make such examination, to be both "physical and oral," and to include a report on the alien's "condition of health, mental and physical." Moreover, as to loathsome and dangerous contagious diseases, and the like, the steamship companies are to be heavily penalized by administrative order by Sec. 9 of this Act (and of the Act of 1907), for bringing over persons, whose "disease might have been detected by means of a competent medical examination at the time of embarkation," a provision sustained by this Court in Ocean Nav. Co. vs. Stranahan, 214 U. S., 320, and which the Immigration Commission reports leads to the exclusion of at least four times as many aliens abroad who have actually purchased tickets for the United States, as are excluded here (Vol. I, p. 195 of Immigration Commission Reports). It is thus obvious that what was the "inspection" of aliens by single inspector under the Act of 1891, as regards physical and general considerations regarding admissibility, has become divided under the present act, into a physical and mental examination by surgeons on the one hand, and on the other, a *"hearing"* before a *"board of special inquiry"* of three Inspectors, who must keep "complete permanent *records of their proceedings*, and of all such *testimony* as may be produced before them," in such shape that the Secretary's decision on appeal "shall be rendered solely upon the evidence adduced before the board of special inquiry," and at which all the evidence relied upon must be adduced and noted down, with opportunity to the alien to meet and rebut the same.

In *U. S. vs. Petkos*, 214 F. R., 978, C. C. A., the Circuit Court of Appeals for the First Circuit said

succinctly, as to boards of special inquiry excluding aliens for physical defects, not certified by the government physicians:

> "Under Section 2 of the Immigration Act as amended March 26th, 1910 (36 Stat., 263), the second of these findings ('being afflicted with a physical defect which will affect his ability to earn a living') could have been made only upon a *certificate to that effect by the examining surgeon.* There was no such certificate then before the examining board." See also quotations from that case below, *post,* pp. 50-1.

Sec. 17 of the Immigration Law now expressly requires the medical officers to make the physical and mental examinations and certify them to the immigration officers.

(b) and (c) Reference is made to the later decisions of the Courts cited, inconsistent with the view that because the board of special inquiry might, conceivably, exclude an immigrant on his appearance alone—this can make their decision non-reviewable, where it appears that they decided the case without such statement on a different assigned ground or under a wrong procedure.

(d) As pointed out by the C. C. A. of the Third Circuit in *Rodgers vs. U. S.,* 152 F. R., 346, quoted *ante,* pages 23-4, the record of the Board of Special Inquiry must affirmatively disclose matters relied upon by the Board, to warrant exclusion, otherwise the defect will be regarded as non-existent.

In Ex. p. Petkos, 212 F. R., 275, the Court distinguished the *Nishimura Ekiu* case in this very respect, stating:

> "There was here no conflict of evidence, as in the cases cited for the respondent; *nor did*

> *the inspectors base their action on the appearance of the immigrant, as in Nishimura Ekiu vs. U. S.*"

Ex. p. Gregory, 210 F. R., 680, 682, is to the same effect. Compare Ark Foo vs. U. S., 128 F. R., 697, 698, C. C. A., and U. S. vs. Lee Chung, 206 F. R., 367. This also renders irrelevant Judge Coxe's suggestion below (fol. 57), that "the board had an opportunity to see the relator and determine by personal observation what manner of men they were."

(e) Obviously, the Secretary on the appeal provided by the Act, cannot review the case intelligently if reliance may be placed on matters not noted on the record. Accordingly Rule 17, Subd. 7 of the Department Rules expressly provides:

> "The *complete* appeal record shall be forwarded promptly to the bureau with the views in writing of the immigration officer in charge."

See further as to this Point II, *post*, pp. 48-57.

(II) (a) *There being no competent proof whatever in the record of the alleged employment conditions in Portland, nor of the alleged inability of petitioners to speak any dialect except their own unfamiliar one, or of other disability likely to affect ability to earn a living, their exclusion on the ground of likelihood to become a public charge is without any evidence, and is reviewable in the Courts on habeas corpus, even independently of the errors of procedure involved.*

Since this case was argued below, this Court once more clearly recognized the duty to review the record to ascertain if there was *any* evidence warranting deportation, in the case of *Lewis vs. Frick*, 233 U. S., 291, 297-300, supplementing the authority of *Zakonite vs. Wolf*, 226 U. S., 272, 274, quoted in the dissenting opinion of Judge Ward herein (fol. 59).

In several of the cases cited *ante*, it was held that incompetent testimony must be disregarded, though it is doubtless true that all the rules of civil and criminal trials need not be followed by such boards, the scope *of review being limited to ascertaining whether* there is *any* competent evidence, familiar in *habeas corpus* proceedings, to review trials before justices of the peace often not lawyers, or on certiorari, to review administrative hearings, like trials of policemen, conducted by laymen, and in reviewing administrative hearings, like those before the Interstate Commerce Commission.

Bryant vs. U. S., 167 U. S., 104.
People ex rel. Board of Police Commissioners, 155 N. Y., 40.
Int. Comm. Com. vs. L. & N. R., 227 U. S., 88, quoted *post*, pp. 60-2.

In all those cases it was held that the admission of merely incompetent testimony does not require a reversal, thus meeting the argument of the Court below (fols. 56-7), but the rule is, of course, settled that there must be *some* competent evidence to justify the result. *As regards the new claim of Boards of Special Inquiry to a right to take judicial notice of such matters, this is a novel and dangerous new assumption of power and the rights of the Government have been adequately protected all these years without such exercise.* In any event, the proof should be produced in definite form, even if it might be *ex parte*, and be sworn to, without requiring sending for witnesses to the Coast. (See *ante*, pp. 15-16).

White vs. Gregory, 213 F. R., 768, C. C. A., reversing 210 F. R., 680, involved no question as to method of proving the alleged industrial conditions there relied on, nor were they there controverted, and that seems to be the first case carried to the courts in which

labor conditions were considered, and the District Court had deemed even this unauthorized and illegal. while in *Healy vs. Backus,* they were formally proved. (See *post,* pp. 70-73).

It has been repeatedly held, and is recognized in the majority opinion of the lower Court, also, that *the record before the board may be examined, to see if there was any competent evidence justifying exclusion on the ground of likelihood to become a public charge, and there is none in the absence of proof of affirmative disabilities.*

U. S. ex rel. Klein vs. Williams, 206 F. R., 460, 461 (C. C. A.), approving 189 F. R., 915, Holt, J.
U. S. ex rel. Rosen vs. Williams, 200 F. R., 538, 541-2 (C. C. A.)
U. S. ex rel. Bauder vs. Uhl, 211 F. R., 628, 632 (C. C. A., Rogers, J.).
U. S. ex rel. Goldenberg vs. Williams, 204 F. R., 828, Noyes, J.
Ex parte Petkos, 212 F. R., 275, modified in 214 F. R., 978.
In re Feinkopf, 47 F. R., 447.
In re Cummings, 32 F. R., 75.
Ex parte Saraceno, 182 F. R., 955, Ward J.
Frick vs. Lewis, 195 F. R., 693 (C. C. A., 6th C.).
Davies vs. Manolis, 179 F. R., 818, 821.

See isolated appellate court case tending to the contrary, White vs. Gregory, 213, F. R., 768, modified by the same judges since, on this very point in Healy vs. Bakus, 221 F. R., 258, 364-5, 9th Circ. (considered *post,* pp. 70-3).

It is true that the decision of immigration officials as to the facts is conclusive and binding on the Courts under Section 25 of the Act of 1907, cited by Judge Lacombe (fol. 43), but that Act and its predecessors were construed in all the cases cited as not making administrative decisions final, where the forms of due

process of law even were disregarded, or where there was no evidence whatever justifying the result reached in the administrative hearing. It will be remembered that, even aside from the general statutory grant of authority to the Federal Court to issue writs of *habeas corpus*, and consitutional protection of that writ, the Immigration Act, in Section 29, still confers jurisdiction on the Federal Courts of "all causes, civil and criminal, arising under any of the provisions of this Act." which alone would suffice to give the courts jurisdiction, subject to non-reviewability of findings on the facts under Section 25. (*U. S. vs. Jung Ah Lung*, 124 U. S., 621, 626-630. *Chin Yow vs. U. S.*, 208 U. S., 8).

Similar provisions under our Customs Laws, making determinations of appraising officers final, have been similarly construed, as not ousting the courts of jurisdiction, to review determinations reached on wrong theories of the law, or without any facts to sustain them (U. S. vs. Passavant, 169 U. S., 16, 20-21; U. S. vs. Haviland, 167 R. R., 414, aff'd, 177 F. R., 175, C. C. A., and Certiorari denied, 216 U. S., 618), and also under our Postal Laws (School of Magnetic Healing vs. McAnnulty, 187 U. S., 94, 108; Public Clearing House vs. Coyne, 194 U. S., 497, 515), and under other laws, including our land laws (Howe vs. Parker, 190 F. R., 738, 746, C. C. A., and cases there cited.)

In *Williams vs. U. S. ex rel. Klein*, 206 F. R., 460 (C. C. A.), the Circuit Court of Appeals for the Second Circuit, approved of Judge Holt's views (189 F. 915), discharging an alien who had been excluded as likely to become a public charge, and held that there was no evidence justifying such conclusion, and agreed with Judge Holt's characterization that the view of the evidence to the contrary taken by the immigration authorities, was

> "'Strained, far-fetched and almost fantastical.' * * * We cannot assume a proposition which has no evidence to sustain it, and which is contrary to the proof and all the presumptions to be drawn therefrom."

This was said of an actress who came over with her husband under false names to escape creditors with $130 in cash between them, one quarter of which was spent for legal services before landing, but with employment offered them here after landing. This view was in accord with the construction of this act previously adopted by that Court in the Rosen and Bauder cases, *supra*, as also in the other cases cited, in various circuits, particularly illuminating being the discussion of the question by the Circuit Court of Appeals for the Seventh Circuit in *Davis vs. Manolis*, of the Circuit Court of Appeals for the 8th Circ. in *Whitfield vs. Hanges*, 222 F. R., 745, and of the Circuit Court of Appeals for the Sixth Circuit in *Frick vs. Lewis, supra*, thereafter affirmed by this Court in 233 U. S., 291. As said by Judge Seaman for the Court in the first of these cases as to a conceded alien:

> "Final determination of the statute applicable to the case and interpretation (to say the least) of the grant of power therein cannot rest with the executive officer under any authority cited; nor can such finality of executive decision have sanction under our system of government. Whatever may be the powers, even of judicial nature, vested in such officers for needful and summary enforcement of the governmental policy, we believe ultimate decision of the fundamental questions above stated must remain with the courts."

In *Frick vs. Lewis, supra*, the Circuit Court of Appeals said:

> "The Court believed that there was no evidence tending to support any of the charges, except the one concerning the woman. Where there is nothing to support a charge, we agree that the department cannot rightfully issue a warrant to deport, for that would be a clear abuse of power. * * * The question is whether anything was offered that tends, though slightly, to sustain the charge."

As above noted, this Court disposed of that case on appeal on this very theory of reviewability.

The very recent opinion of Sanborn, J., for the C. C. A., for the 8th Circuit in *Whitfield vs. Hanges*, 222 F. R., 745, 751, ably collates the authorities to the same effect.

(b) These cases are all in line with the early federal decisions that *a person cannot be excluded as likely to become a public charge, unless there be some evidence of substantial affirmative disabilities*, and that all the agencies at the disposal of the immigrant to aid him in his new home, including the assistance of relatives not legally obligated to support him, and of friends, must be taken into account, in deciding the "likely to become a public charge" issue.

In re Feinknopf, 47 F. R., 447.
In re O'Sullivan, 31 F. 447.
In re Bracmadfar, 37 F. R., 774, 776, Brown J.
In re Day, 27 F. R., 678, Brown, J.
U. S. vs. Lipkis, 56 F. R., 427, 428.
Ex parte Saraceno, 182, F. R., 955.
Ex parte Petkos (quoted pp. 50-1).
Williams vs. U. S. ex rel. Klein (quoted ante pp. 40-1).
U. S. ex rel. vs. Williams, 204 F. R., 828.

In the leading case on the subject, the Feinknopf case, *supra*, the immigrant was forty years old, vigorous and well, a cabinet maker by trade, had no family; had baggage with him worth $20 and fifty cents in cash, and was willing to work at his trade. In the

course of an opinion reversing an order of exclusion, the Court said:

> "When a record shows a determination that the immigrant is likely to become a public charge, made without a particle of evidence tending to prove the fact, there has been no such determination as the statute contemplates, and in the absence of such a determination, no valid order for the return of the petitioner can be made."

In *United States v. Lipkis, supra,* Judge Brown held that no bond against liability to become a public charge, even, should be required, simply because a man has very little money, saying (at p. 428) that:

> "When an able-bodied workman comes to this country, who is able to take care of himself and his family, and is likely to procure remunerative work in his trade, it is not the practice to require a bond from him merely because he may have but little ready money, and upon the mere possibility that he may meet with some accident that may make him a cripple and thus render him and his family a publice charge. For at the time of arrival he is not likely to become a public charge, his health, capacity for work, and the probability that he will obtain work, furnish ordinary and sufficient security, in the ordinary course of things, against any such liability."

And in *In re Bracmadfar, supra,* Judge Brown sustained a writ of *habeas corpus* sued out on behalf of twenty-one (21) Armenian immigrants, and directed their admission, even though some of them possessed very little money, it appearing that they were all able-bodied and healthy, and that nearly all of them had friends in this city.

In *In re Day, supra,* Judge Brown held (at p. 681), as to minor aliens going to farmers, with whom they had been apprenticed, that:

> "*All the means of care or support that are provided for the passenger, and are available for his benefit, must be taken into account.* The law intends those only, that are likely to 'become a public charge,' because they can neither take care of themselves, nor are under the charge or protection of any other person, *who, by natural relation or by assumed responsibility, furnishes reasonable assurance that they will not become a charge upon the public.*"

This case was followed as authoritative on July 28, 1909, on this very question by Mr. Earl as solicitor for the Department of Commerce and Labor in an able opinion, and the principle applied in other cases cited above. In fact, Sec. 7 of the Immigration Act of 1893, and again Sec. 25 of the Act of 1903, expressly authorized accepting bonds or guarantees against aliens becoming public charges, even from a "charitable or benevolent society or association," with the approval of the secretary.

In an important State paper, Mr. Bayard as Secretary of State, writing to the British Ambassador, clearly showed that our national legislative policy is not, and should not be, to exclude immigrants because of *poverty*, or in view of our treaties with various foreign countries, conferring equality of rights, because of chauvinistic and unwarranted *valuations of relative race values*, even under the new and specious far-fetched theory that race prejudice against certain aliens may tend to make them become public charges, because of enhanced difficulty in finding employment here. When Secretary Bayard wrote, in 1887, the public charge provision which he considered was, substantially the same as now, Sec. 2 of the Act of 1882, excluding an alien "unable to take care of himself or herself without becoming a public charge," though the provisions of the Act of 1891 (Sec. 1) and

1903, (Sec. 2), were subsequently added, using the simpler phrase "persons likely to become a public charge" and throwing the burden of proof to establish admissibility on a person" whose ticket or passage is paid for with the money of another, or who is assisted by others to come," as also the Act of 1907, forbidding the admission absolutely of persons whose passage was directly or indirectly paid for by corporations, societies, municipalities, or foreign governments. Secretary Bayard addressed himself particularly to Irish immigrants who were being sent over by the British Government at its expense, and whose cases soon after were considered in *In re O'Sullivan*, 31 F. R. 447, and he wrote regarding Sec. 2 of the Act of Aug. 3, 1882:

> "The only test therein provided is the ability of the intended immigrant, 'to take care of himself or herself without becoming a public charge,' and *this test is to be applied impartially to all persons of whatever nationality.* The economic and political conditions of the United States *have always led the Government to favor immigration, and all persons seeking a new field of effort and coming hither with a view to the improvement of their condition by the free exercise of their faculties, have been cordially received,* and the same conditions have caused other kinds of immigration to be regarded as undesirable, and led to the addition of other enumerated classes. Such immigration the economic and political conditions of the United States render peculiarly unwelcome. In view of this policy and these laws, this Government could not fail to look with disfavor and concern upon the sending to this country by foreign Governmental agencies and at the public cost, of persons not only unlikely to develop quantities of thrift and self-support, but sent here because it is assumed that they have friends in this country able to 'help and support them.' *The mere fact of poverty has*

never been regarded as an objection to an immigrant and a large part of those who have come to our shores have been persons who relied for support solely upon the exercise of thrift and manual industry, and to such persons, it may be said, the development of the country has in a large degree been due" (Foreign Relations of U. S. for 1887, pp. 520-1).

Of course, in his comments regarding expectant aid from friends here, Secretary Bayard did not seek to ignore such aid as an important factor, serving the immigrant, but he was dealing with the excuse proffered by England for thus sending at a foreign government's expense, dependent aliens over. As seen *ante,* the Courts have expressly recognized the importance of such factor in minimizing the possibility of aliens becoming public charges. However, while recognizing such foreign State aid to immigration as a factor on the public charge issues, these very aliens were admitted nevertheless by the Court in *In re O'Sullivan, supra,* and Congress subsequently dealt with the question as indicated.

Moreover, as was well said by the Committee of Congress, which framed the original "assisted immigration provision" in the Act of 1891, in its Report (H. Rept. 52nd, Cong. 2nd Session, No. 3472 p. IV), under date of Jan. 14th, 1891:

> "Assisted immigration is of two kinds: *Those assisted by friends from this side of the water is the best class of immigration, for they have relatives or friends here who will care for them in their untried surroundings.* But the immigrant assisted from the other side usually has no friends here, and if any on the other side, their chiefest interest is in getting rid of what is likely soon to become a burden. The assisted ticket immigrant should not be made an excluded class, but our experience has been so unfortunate that it is prudent to have

him show affirmatively that he does not belong to one of the excluded classes."

(c) As has been well said: (quoted Imm. Comm. Reports, Vol. 41, p. 145).

> "Once a foreigner has shown that he is able-bodied, free from contagious diseases, and neither a criminal, an anarchist, nor polygamist, nor certain to become a public charge, he has made out a *prima facie* case for his admission.
>
> As to the fear of letting in aliens to become public charges upon public charity, it seems to us that *the provision of the law which orders such immigrants back within three years after their arrival should encourage clemency at Ellis Island, rather than harshness. If the immigrant who falls into pauperism can be gotten rid of within three years, why should our immigration officers speculate excessively upon the chances of an immigrant becoming a pauper?* Here again he should be given the benefit of the doubt—given a chance to show that what this country offers its newcomers is not poverty, but a living."

(d) It will furthermore be noticed that Congress recognized that the words "likely to become a public charge" had acquired so clear and settled a meaning by years of judicial and practical construction that in the Act of 1907 (Sec. 2), it made a separate class of excludable aliens, while retaining the old class, by the words:

> "Persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeons as being mentally or physically defectives, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living."

Even when it enacted these precise words "likely to become a public charge" in 1891 and thereafter re-

enacted them, *they were used in the light of their uniform and well established prior judicial construction, as seen.*

(e) Some aspects of the supposed disabilities of petitioners are more fully considered on the facts (*ante*, pp. 11-17).

POINT II.

Even as regards matters that may be judicially noticed, without formal proof, the matter relied upon must be specifically referred to on the trial, and produced, so that the immigrant may know what is relied upon to exclude him, and can meet it by proof.

(a) *Even as regards matters judicially noticeable, the authority relied upon should be produced in court, and the fact of judicial notice being taken, spread upon the record before the close of the case, so that proof can be adduced by the other side to meet the same.*

In *McKinnon vs. Bliss*, 21 N. Y., 206, 214-5, the Court held, in connection with a review of the earlier authorities, that *even matter intended to be noticed judicially, should be produced in court and specifically pointed out.* Said the Court:

> *"In the first place it was not introduced or offered upon the trial.* There are no doubt cases in which courts, upon questions addressed to them, may take judicial notice of matters of general history and of public and universal notoriety, which admit of no dispute. But upon the trial of issues of fact by a jury *if*

> *reliance is placed upon any matter of this kind, some evidence of it must be adducted.* * * * The rule is as here stated. That it should be so, is obvious, not only in order that the jury may all be equally possessed of the evidence from which their conclusions are to be drawn, but that the facts upon which their conduct is based, may be known."
>
> See accordingly, Kaolatype Co. vs. Hoke, 30 F. R., 444, 446, as to equity cases.

In *Walton vs. Stafford,* 14 N. Y. App. Div., 310, the Court on appeal was asked to take judicial notice that the first day of January in the year involved was a Sunday, but declined, stating:

> *"It is true that it was not a fact which the defendants were bound to prove in the ordinary way, but it was none the less a fact which they are required—if they desired its consideration—to place in some way before the court and jury.* They were at least bound to bring the fact to the attention of the Court, and to claim for it judicial notice. *As they did not do this, the fact is not in the case."*

In accordance with such established practice, the Court (Coxe, J.), formally described, upon the record, matter noticed judicially in a case tried without jury in

> *Dominici vs. U. S.,* 72 F. R., 46

Similarly, it is well settled that material facts, which can be noticed judicially, may not be left out of the pleadings, when essential or jurisdictional allegations.

> *Arkansas vs. Kansas Coal Co.,* 183 U. S., 185, 189-190.

In the last cited case, the Court quoted with approval from Thayer on Evidence, Ch. VII, page 281, in its treatment of "judicial notice," as follows:

> *"The right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication, which regulate the mode of bringing controversies into court, and of stating and conducting them."*

The same learned author well says in that treatise, on page 309, in discussing the limits of judicial notice:

> *"This function is indeed a delicate one; if it is too loosely or ignorantly exercised, it may annul the principles of evidence and even of substantive law."*

The precise question was considered, with respect to the right of a board of special inquiry to take judicial notice of facts, in the recent case of

Ex p. Petkos, 212 F. R., 275 (Morton, J.).

The relator was excluded by the Board of Special Inquiry, because they found that he had a non-contagious skin disease which, they inferred, without proof, and erroneously, would tend to make him a public charge, by reason of its supposed offensive odor and appearance, and its making him obnoxious in consequence. Said the Court, in entertaining jurisdiction in *habeas corpus* proceedings, after citing some authorities above considered:

> *"A fair hearing implies* that a party concerned shall not only have an opportunity to present evidence in his favor (which was fully accorded in this instance), *but also that he shall be apprised of the evidence against him, so that at the conclusion of the hearing he may be in a position to know all the evidence on which the matter is to be decided.* * * *
>
> *"In this case the immigration tribunals decided, 'as matter of common knowledge,' in the* first instance that psoriasis causes an odor so offensive as to make the sufferer obnoxious

to persons about him, whereas in fact it appears to have no odor at all; and, in the second instance, that, although the disease has no odor, its appearance would be so repulsive as to interfere with the petitioner's ability to get work, whereas in fact the disease rarely shows itself on the exposed parts of the body.

"There was here no conflict of evidence, as in the cases cited for the respondent; *nor did the inspectors base their action on the appearance of the immigrant,* as in *Nishimura Ekiu vs. United States,* 142 U. S., 651, 660, 12 Sup. Ct., 336, 35 L. Ed., 1146. *They acted on their own mistaken assumption that they knew about a matter, of which there was no evidence* and which appears to have been beyond their knowledge. Whether this is called an 'abuse of discretion,' or an 'unreasonable conclusion,' or 'arbitrary conduct,' it was plainly unfair and injurious to the petitioner. *He could not foresee that the immigration officials would assume to be familiar with the characteristics of psoriasis, still less that their assumption of knowledge would lead them into such fundamental errors concerning it as appear in their findings, and to a conclusion, apparently erroneous, and certainly unsupported by any evidence. He was never apprised of the evidence on which he is to be deported and has had no opportunity to met it. It is not that the decision was wrong, but that it was reached by wrong methods, and, as it seems to me, in disregard of fundamental principles.*

"I find and rule that the petitioner has not had a fair hearing before the immigration authorities; that under the rule laid down in *Chin Yow vs. United States, supra,* the jurisdiction of this court has attached; that the writ of habeas corpus must issue; and that there must be a hearing on the merits before this court."

This view was affirmed on appeal in 214 F. R., 978 C. C. A., 1st Circ., where the appellate court said

that the adverse finding of the Court "was founded *upon their mistaken assumption unsupported by any lawful evidence,* that his disability necessarily affected his ability to earn a living."

In *Whitfield vs. Hanges,* 222 F. R., 745, C. C. A., the Court, Sanborn, J., writing held that a warrant of deportation was improperly issued where the only evidence against the alien was gathered before the warrant of arrest issued, and was in the shape of *ex parte* affidavits not introduced in evidence at the hearings on the warrant and which the inspectors had no authority at that time to take under oath, and cross-examination of which witnesses on behalf of the aliens the inspector prevented after the arrest. Said the Court:

> *"Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected;* that the accused shall be notified of the nature of the charge against him in time to meet it; *that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it* (p. 497). * * *
>
> "During the hearing the inspector permitted counsel for the appellees to read the statements he and the police officers had drawn from the prostitutes before the arrest was made, *but neither he nor the government offered or introduced these statements in evidence, nor would they have constituted evidence if offered because, since the inspector had no authority to administer an oath, they were not sworn to,* be-

cause they were the statements of the prostitutes extracted in secret under the ever-present fear which the call or seizure by police or other officers of persons of their character unavoidably imposes upon them, and because these women had not been called to the hearing and the appellees had no opportunity to cross-examine them. These women were at the command of the inspector. He called them by means of the police, and he had the power to call them again. The record convinces that he or his servants, the police officers, caused them to be notified that they were not required to respond to the call of the the appellees. *During the hearing counsel for the appellees requested the inspector to call them in order that the counsel for the appellees might examine them, requested that in the interest of a fair hearing he exercise the same power to procure evidence of the truth from the same parties that he had exercised to procure statements from them against the appellees.* The appellees had no right to subpoena and no other method to get these women to come and testify, but the inspector refused to call them. The chief of police, and Campbell, the captain, were present at the hearing. Counsel for the appellees requested each of them to take the stand and testify. The chief refused to do so, but said he might do so if the inspector requested him. Campbell said he would testify if the government man allowed him to. Counsel for the appellees asked the inspector to assist in developing the truth by requesting the officers to testify. He refused, and they did not testify, except at the subsequent call of the inspector in rebuttal, and then only to matters not relevant to the charges against the aliens. * * * And that is not a fair hearing in which the inspector, with his control of important witnesses takes their statements in a secret *ex parte* examination before himself prior to the hearing, and then refuses the request of the accused to call them, or to re-

quest them to testify at the hearing, and thereby *deprives the accused of the opportunity to examine or cross-examine them and to have the benefit of their testimony.* Chin Yow v. United States, 208 U. S., 8, 11, 12, 28 Sup. Ct., 201, 52 L. Ed., 369; United States vs. Sibray (C. C.), 178 Fed., 144, 149; United States vs. Williams (D. C.), 185 Fed., 598, 604; Roux vs. Commissioner of Immigration, 203 Fed., 413, 417, 121 C. C. A., 523.

"After the hearing the inspector made and forwarded his report and recommendation to the effect that the appellees were guilty of the charges, and that they should be deported. This report states the evidence on which it is founded, and discloses the fact that *it is based, not on the evidence at the hearing, but on the statements of the prostitutes extracted before the arrest, which are condensed and recited in the report, and on rumors and hearsay which are set forth in the report, in support of which there was no evidence in the case, of which the accused had no notice and which he had no opportunity to refute by evidence or otherwise.* * * *

"Here is another *statement unsupported by any evidence, and not mentioned at the trial,* a statement illustrative of the basis of the finding and recommendation of the inspector:

" 'I inclose herewith a *newspaper article* taken from the Mason City Gazette of November 5, 1913, showing that the body of the murdered child of Ada Burgess has been removed from its burying place, and is believed to be the work of Greeks, friends of Louis Chirikos. The police officers tell me they have a great deal of trouble with the Greeks of Mason City.'

"That was not a fair hearing in which the inspector after the hearing imported into the case and based his finding and recommendation of deportation on hearsay and rumors of alleged facts which there was no evidence to support, and which the accused had no notice of and no opportunity to refute at the hearing.

> *Interstate Commerce Comm. vs. Louisville & Nashville R. R. Co.*, 227 U. S., 88, 93, 33 Sup. Ct., 185, 57 L. Ed., 431; *Ex parte Petkos* (D. C.), 212 Fed., 275, 277, 278."

This case is, of course, directly inconsistent with the view that the immigration authorities may decide cases on unsworn, unproduced, testimony. It involved Sec. 20 of the Act of 1907, as to deportation procedure which this Court in The Japanese Immigrant Case, *supra*, held must be made to conform to due process of law. Sec. 25 of the Act of 1907 is much clearer and more emphatic in requiring boards of special inquiry to "keep a complete permanent record * * * of all such *testimony* as may be produced before them," and that the appeal shall be determined "solely upon the evidence adduced before the boards of special inqury," and clearly requires *sworn* testimony. The peculiar connotation of the term "testimony" is that the proof must be taken under oath (Cyc., Vol. 16, p. 849; 38 Cyc., 248; Edelstein vs. U. S., 149 F. R., 636, 640, C. C. A. certiorari denied; 205 U. S., 543), though it may, in appropriate cases include affidavits (38 Cyc., 248, citing Woods vs. State, 134 Ind., 35, 42; Edelstein vs. U. S., *supra*).

See also authorities cited under Point I, and particularly *Davies vs. Manolis* (*ante*, pp. 21-2). *Rodgers vs. U. S.* (*ante*, pp. 23-4) and *In re Con Pon* (*ante*, pp. 27-8), also *Interst. Com. Comm. vs. L. & N. R. Co.*, 227 U. S., 88 (quoted *post*, pp. 60-2; also *ante*, pp. 15-16).

(b) *Where courts take judicial notice of facts and err in their assumed facts, a question of law is presented.* Said the Court in *U. S. vs. 1,500 Bales Cotton*, 27 F. C., 15,958:

> "If the judge assumes the duty of its determination he must decide it correctly * * *. *It is as much an error for the Court to mistake*

an historical fact of which it has taken cognizance as to mistake a principle of law."
See acc. Ex. p. Petkos, *supra* (quoted *ante*, pp. 50-2).

(c) *Particularly under the Immigration Law procedure, by which the alien is examined without the aid of counsel or friend before the Board, and is generally unfamiliar with our language and procedure, but on appeal is limited to this record, it is important that he should know all the facts and his right there to meet the government contentions.*

(d) As already pointed out herein, the practice applicable to habeas proceedings in the federal courts makes it incumbent on the government to produce the documents it relied upon, and the same result is reached by the rule requiring a party to produce evidence preculiarly in his own power, otherwise it is presumed to be non-existent (*ante*, pp. 4-5, 9). Upon this record, therefore, there is no proof whatever of the alleged unfavorable labor conditions on which the board based its decision.

(e) It is thus apparent that due process of law was here denied, whether the Board might or might not take judicial notice of the alleged labor conditions, because *the alleged reports were not produced before the Board, even in newspaper form,* and relators were not apprised that they would be relied upon, and hence had no opportunity to meet them and *because they were not included in the record on the appeal, though the Act and the rule require all the evidence, before the Board to be sent up on the appeal.* Judge Ward in his dissenting opinion, properly emphasized the defect of procedure and consequent injustice involved, in omitting these reports from the record sent to the secretary on the appeal (fol. 60).

(f) Moreover, *statutes like the immigration laws fall within the general class of statutes in derogation*

of personal liberty which should be construed in favor of individual liberty and personal right (*Moffett vs. U. S.*, 128 F. R., 375, 378, C. C. A., *Tsoi Sim vs. U. S.*, 116 F. R., 920, C. C. A., *Redfern vs. Halpert*, 186 F. R., 150, C. C. A., *The Japanese Immigrant Case*, 189 U. S., 86, *Lieber's Hermentics* [3rd Ed.], pp. 128-9, 137, *Martin vs. Goldstein*, 20 App. Div., 203, 206, *Am. & Eng. Ency. of Law*, Vol. 26, pp. 661-2, 659, 646, 8 of 2nd Ed..)

POINT III.

Even if Boards of Special Inquiry have the powers of Courts, to take judicial notice of facts which Courts might notice judicially, when properly presented before them, still even Courts cannot notice judicially such facts as are here involved, under the authorities governing judicial notice, especially not on the basis of alleged newspaper reports, not produced or even identified.

I. (1) Presumably certain notorious uncontroverted facts "which everybody knows," may be noticed judicially by courts and also by boards of special inquiry, such as are mentioned by way of illustration in the opinion of the lower Court, like a supposititous destruction of Portland by flood or fire, or the raging of an epidemic there. This is on the theory that "courts may and should notice without proof, and assume as known by others, whatever, as the phrase is, 'every-

body knows.'" (*Thayer on Evidence*, p. 301; compare *North Hempstead vs. Gregory*, 53 App. Div., 350, 353, *et seq.*). The C. C. A. in *Am. Sulphite Co. vs. De Grasse Co.*, 157 F. R., 660 (Coxe, J., writing), pointed out and applied the necessary limitations on this doctrine, and quoted with approval the statement that—

> *"This power is to be exercised with caution. Care must be taken that the necessary notoriety exists. Every reasonable doubt upon the subject should be promptly resolved in the negative."*

Such uncertain, complex, ever-varying facts, changing constantly in point of time, and differing at the same time, as to different places and lines of industry and relating to distant places—as labor conditions in their relation to a particular person's being able to get employment either in his specialty, or any other, cannot be noticed judicially by the courts. This is expressly conceded in Judge Coxe's opinion below (fol. 57), where he says:

> *"It is true that information in this form would not be permitted in a court of law,* but the immigration officers cannot delay these proceedings indefinitely." (But see *ante*, pp. 15-16).

Practically the identical question was passed upon by Judge Gaynor in *Smid vs. Bernard*, 31 Misc. Rep., 35, 38, where he held that the courts cannot take

> "judicial notice of the local rate of wages for the different grades of work in bakeries in the Bohemian quarter of New York City * * * such notice could not even be taken of the rate of wages in bakeries generally."

Similarly, in *Market Bank vs. Pacific Nat. Bank*, 27 Hun, 465, the Court, at General Term, reversed the action of the Court below in taking judicial no-

tice of the fact, based on general rumor, that defendant bank, located in Boston, was insolvent, saying:

> "To justify a court or judicial officer in acting upon knowledge or information thus acquired (by judicial notice), it can only be in regard to *a matter which has become notorious and of general public interest and concern, and not in regard to a transaction, custom or event of mere local or private interest, possessing little notoriety.*"

Compare *Whitfield vs. Hanges* and Ex. p. Petkos (quoted *ante*, pp. 54-5, 50-2).

To take judicial notice of the alleged facts here involved, runs counter to well-established principles, regarding the limitations upon judicial notice.

(a) *"Facts of recent occurrence relating to a limited section of country cannot be considered as covered by judicial knowledge, as matter of history."*

Cyc. of Law & Proc., Vol. 16, p. 868.
Morris vs. Harmer, 7 Peters, 554, 558.
McKinnon vs. Bliss, 21 N. Y., 206, 216.
North Hempstead vs. Gregory, 53 App. Div., 350, 355.
Market Bank vs. Pacific Nat. Bank, supra.
Smid vs. Bernard, supra.

Said the Court in *McKinnon vs. Bliss, supra:*

> *"Such evidence is only admissible to prove facts of a general and public nature, and not those which concern individuals or mere local communities."*

(b) *Matters constantly changing materially and not definitely fixed and "known by everybody," cannot thus be noticed.*

Cyc. of Law & Proc., Vol. 16, pp. 870, 871.
Adams vs. Elwood, 176 N. Y., 106.
Kokes vs. State, 55 Nebr., 691, 701.
Bank vs. Ayers, 160 U. S., 660.

In *Adams vs. Elwood, supra,* the question was presented whether a county judge was disqualified from acting as a referee under the Constitutional provision, forbidding such appointment of county judges in counties having more than 120,000 inhabitants, but the Court said it could not notice such alleged fact judicially, saying:

> "There may be a moral certainty that the population of Queens County in 1900 exceeded 120,000, but in this matter we can take judicial notice of nothing but facts authenticated by public records."

In *Bank vs. Ayers, supra,* this Court said:

> "The relative proportions in which the moneyed capital of the State of Kansas is invested in the various kinds of securities to be therein found, this Court cannot judicially know."

(c) *It is also well settled that the courts should hesitate to take judicial notice of facts in controversy in the action.*

North Hempstead vs. Gregory, 53 App. Div., 350, 357.
Patent Button Co. vs. Consol. Fastener Co., 84 F. R., 189.
Walton vs. Stafford, 14 App. Div., 310, 313.

(2) *The limitations upon the right to notice facts judicially are more, not less, stringent, as applied to administrative bodies, which naturally are commonly composed of men of much less intelligence, judgment and independence than are our courts and especially as against aliens denied the right to counsel and advisors until after exclusion by the board, and commonly unfamiliar with our language and procedure.*

In the very recent case of *Int. Comm. Commission vs. Louisville & N. R. R.,* 227 U. S., 88, 91, 93, substantially the same question was involved. The Inter-

state Commerce Commission sought to sustain an order against defendant upon the basis of its own *ex parte* investigations and knowledge, in addition to the evidence adduced when defendant was represented. This Court carefully considered the authorities applicable to administrative hearings, including several of the immigration cases relied upon herein by the Government (p. 91), and said emphatically in a unanimous opinion, in passages expressly including immigration officials:

> *"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the constitution's condemnation of all arbitrary exercise of power.* * * *
>
> "The Government further insists that *the Commerce Act* (36 *Stat.*, 743,) *requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and* having been given legislative power to make rates, *it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evi-*

dence is offered or considered and is not given an opportunity to test, explain or refute. The information gathered under the provisions of Section 12 may be used as a basis for instituting prosecutions for violations of the law, and for many other purposes, but *is not available as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and,* even where it acts in a *quasi* judicial capacity, *is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Int. Com. Comm. vs. Baird,* 194 U. S., 25. *But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.* In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. *All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.* In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding."

This was followed as controlling under the Immigration Act in *Hanges vs. Whitfield, supra* (pp. 52-5). See accordingly, as to police trials:

Peo. ex rel. Clark vs. Roosevelt, 168 N. Y., 488.

(3) *To vest such sweeping power in $1,800 a year Inspectors under the Immigration Laws, who are notoriously lacking in education, and weak, in general,*

but who are vested with power to pass on the rights of over a million persons a year, including claims to citizenship, would be a public calamity, and the present instance is the first one in which any Court, in any reported decision, has sustained such claim.

Said the Immigration Commission unanimously of the Inspectors constituting Boards of Special Inquiry in its report to Congress of Dec. 5, 1910 (Senate Document No. 747 of the 61st Congress, 3rd Session, Vol. I), after it had investigated the work of these inspectors:

> "The boards exercise a power which, if not properly used may result in injustice to the immigrant, or, through the admission of undesirable aliens, in harm to the country. *It is important, therefore, that these boards, should be composed of unprejudiced men of ability, training, and good judgment.* * * *
>
> "*At all the important parts the boards of special inquiry are composed of immigrant inspectors who generally are without judicial or legal training. This, together with the fact that they are selected by the Commissioners of Immigration at the ports where they serve, tends to impair the judicial character of the board and to influence its members in a greater or less degree to reflect in their decisions the attitude of the Commissioner in determining the cases.* The character of their decisions is indicated somewhat by the fact that nearly fifty per cent of the cases appealed are reversed by the Secretary of Commerce and Labor, whose decision, under the law, must be based solely upon the evidence adduced before the board. This record of reversal on appeal suggests that their decisions which are not reviewed, may be equally wrong.
>
> "*In justice to the immigrant, and to the country as well, the character of these boards should be improved. They should be composed of men whose ability and training fit them for the judicial functions performed,* and the provision

compelling their hearings to be separate and apart from the public should be repealed." (Compare U. S. vs. Sing Tuck, 194 U. S. 161 at 169-170, 176-7, indicating that the practice of construing this provision as forbidding the presence of counsel or advisor is erroneous and Pres. Roosevelt's Ellis Island Commission also so reported. Vol. 41, Imm. Comm. Repts., 173).

As bearing on the practical workings of a rule which would vest these inspectors with power to assume such unproven facts, reference is prayed to some recent cases in the courts. In *ex parte Petkos, supra* (pp. 50-2), they assumed, without proof and contrary to the facts, that the disease involved, psoriasis, caused an offensive odor; on a rehearing, when their blunder seems to have been called to their attention, they assumed, without evidence and contrary to the facts, that its appearance, and not its odor, caused its victim to appear repulsive. In the *Klein* case, the Court felt constrained to approve Judge Holt's statement that their conclusion that relator was likely to become a public charge was "strained, far-fetched and almost fantastical." In two recent cases, they dissuaded their victims from securing the aid of counsel in deportation proceedings on the pretext that there would be a better chance for discharge without such aid, but in fact, in order to "railroad" them more easily (*U. S. vs. Williams,* 185 F. R., 598; *Roux vs. Commissioners,* 203 F. R., 413). In two other cases they ignored prior judicial determinations of American citizenship (171 F. R., 413, C. C. A.; 187 F. R. 544 C. C. A.), despite prior judicial decisions adjudicating the binding force of such determinations. In *U. S. vs. Wong Chang,* 92 F. R., 141, Judge Coxe characterized their determination based on a hearsay report, as "such stuff as dreams are made of," and that "no man whose brain is in a normal condition

would regulate the most trivial affairs of life upon such information." See also *Whitfield vs. Hanges*, 222 F. R., 745, C. C. A., and *Zouras vs. Allen*, 222 F. R., 756, C. C. A. These are but samples. Surely, such course would be a denial of "due process of law."

(II) *Even if such facts regarding economic conditions can be noticed judicially, the alleged newspaper reports here involved could not lawfully be considered as the basis for judicial notice, and there is no other proof of the alleged facts in question.*

(1) The rule is correctly laid down in *Walton vs. Stafford*, 14 App. Div., 310, that "the party asking the court to take judicial notice thereof must, at the judge's request, furnish the proper books or documentary evidence wherewith to refresh his recollection." There is a consensus of opinion that newspaper reports are, in general, not proper sources of information where judicial notice is to be taken.

Said the Court in *Whelan vs. Lynch*, 60 N. Y., 469, 474:

> *"It is not plain how a newspaper*, containing the price current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, *can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depend entirely upon the sources from which the information is derived. Mere quotations from other newspapers or information obtained from those who have not the means of procuring it, would be entitled to but little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself, without some proof of knowledge of the mode in which the list was made out. As there was no*

such testimony, the evidence was entirely incompetent, and should not have been received."

See also:

Downs vs. N. Y. Central, 47 N. Y., 83.

In *Longley vs. Smith,* 3 St. Rep., 276, McAdam, J., writing, it was held to have been error to have received a directory in evidence as proof of defendant's address; said the Court:

> "There is no rule making a directory evidence *per se. The accuracy and reliability of such publications depend entirely upon the source from which the information it contained is obtained.* The statement in the directory was unverified, and *no attempt was made to show by whose or what authority the name and address of the defendant appeared, or how, when, where, from what, from whom, or by whom the information was obtained, so as to connect the defendant with the publication or even charge him with knowledge of it.* Evidence of this sort must be considered as mere hearsay, and as such is of an unreliable character. *Matters alleged in historical, professional, statistical or scientific books, not of a general and public nature and concerning* only individuals or *local communities,* when relevant to an issue, *must be proved as other facts;* that is to say, this must be verified by oral evidence showing their reliability."

See also

Harris vs. Panama Co., 3 Bosw., 7.
McKinnon vs. Bliss, 21 N. Y., 215.
Caldwell vs. National Bank, 64 Barb., 333; Greenl. Ev., Sec. 440, note.
Morris vs. Harmer's Estate, 7 Peters, 554.
Whitfield vs. Hanges (quoted, *ante,* p. 54).

(2) *The lower court was evidently misled as to the sources of these alleged facts,* which are referred to in

the majority opinion as "published reports and inquiries," "the press and other sources." (fols. 56, 57). We beg leave to supplement Judge Ward's comment on their inadequacy, he having said in his dissenting opinion (fol. 60):

> "The board does not state whether the reports were oral or written, when they were made, who made them, whether the person or persons who made them were qualified to express an opinion, or what the reports were."

It will be noticed that the only definite statement regarding their character is to be found in Mr. Uhl's letters of transmittal (fols. 28, 39), made some days *after* the hearing, and obviously based on his inquiries outside of the record on the subject, for he refers to further facts that occurred at the hearing, not disclosed by the record, *i. e.*, the alleged inability of all but one of the aliens to speak anything but their own dialect (fol. 39). He frankly states that the assumption in question was based on *"the information contained in the press of recent date"* (fol. 28). This analysis of the facts shows the real nature of the "reports," mere unproduced and unidentified alleged newspaper reports, that the board pompously referred to in its decision as "recent employment reports of industrial conditions at Portland and vicinity" (fol. 26; compare 31, 37).

(3) Inquiry made in Washington at the Department of Labor since this Court's decision, indicates that the department had no reports on the subject at the time these cases were before the board. In fact, we learn that some weeks previously the Department had discontinued the practice of having its employees furnish it with reports of this kind in connection with contract labor law investigations, because they arrived too late to be of value and were otherwise also unreliable. It will be noticed that no date of publication of the alleged newspaper reports is given, as

pointed out by Judge Ward, nor anything bearing on their accuracy or origin, nor their comprehensiveness. It should be remembered that conditions in different industries, even at the same time and place, are widely different, some being very busy, while others may be idle, but the reports are not claimed to refer to any particular industry. So also places near each other are often in materially different conditions in this respect. Moreover, often employment is seasonal, involving occasional periods of unemployment, compensated for by higher wages at the time of employment in such pursuits. The work of "farm laborers" —the occupation of relators—became particularly active about February, and thereafter throughout the summer and autumn, and the official Government conference report cited *ante* (p. 12), shows that many thousands of farm hands move each year into our agricultural districts, to work there, and then depart in the fall to take up other work, and whose labor the country at large absolutely needs. Nothing, moreover, is more difficult for even the expert to master than industrial employment conditions, as they are made up of so many different and ever-changing factors. Nor is anything so misleading as inferences from non-employment of some people at any particular time, for it is of course notorious that lack of character, laziness, lack of opportunity or of influence, whim or unwillingness to take up particular lines of work, result in some people being out of work at all times in a community, even when there is the greatest demand for labor in the very community involved. As pointed out, *ante* (pp. 10, 11-12), "farm laborers," like those here involved, are particularly needed by the country, and have no difficulty in finding work. Relators were destined to the vicinity of Portland, be-

cause a couple of thousand of their race, Ossetes, have migrated to the United States during the past few years, making the vicinity of Portland their headquarters, and there, among their countrymen, converse readily with each other, and help each other, and succeed. Some persons are, moreover, always interested for political reasons in exaggerating reports of non-employment, and making them sensational.

It is not without interest to observe in this connection that the Commissioner of Labor of the State of New York publicly on February 27, 1914, denied published newspaper reports that there were 300,000 unemployed in New York City at that time, after careful investigation, and stated that it is an exaggeration to say that there were so many unemployed in the whole State.

So, also, Royal Meeker, U. S. Commissioner of Labor Statistics, in April of the present year frankly said (Annals of Am. Academy of Political and Social Science, Vol. LXI, whole No. 150, p. 24).

> "The fact is that in this country we have a very complete fund of ignorance on the question of unemployment. We have no, or practically no, authentic information as to what the normal amount of unemployment is in this country, even at the best of times * * * When I took charge of the Bureau of Labor Statistics I very speedily discovered that so far as the Federal Bureau was concerned, no information existed as to the amount of unemployment or where unemployment existed. Now I conceive that it is the first job of the Federal Commissioner of Labor Statistics to know that very thing. I have been racking my brain, trying to devise ways and means by which I can get some line upon the amount of unemployment from month to month in every important city and locality in the United States. As yet I am still racking."

POINT IV.

The immigration authorities are not authorized to exclude aliens on the supposed ground of unfavorable industrial conditions in the place to which they are destined, because such factor is not one vested in the immigration authorities by Congress as a justifiable ground for exclusion, nor are the petty immigration officials competent to pass upon such uncertain and complicated ever-varying conditions, nor is any satisfactory method of apprising them of the same provided by law, nor on the other hand, are the immigrants wedded to any particular destination, but are quite certain to go to a place economically more desirable than their original proposed destination, if conditions in the latter place so suggest.

(a) This Court has never passed upon this important question. In one aspect it was passed upon below in the case of *ex parte Gregory*, 210 Fed. Rep., 680. There the Board of Special Inquiry in view of uncontroverted local, economic conditions, excluded certain immigrants, avowedly, because of labor conditions rendering it in their opinion improbable that the aliens

would under these conditions be able to get along without becoming public charges. The District Court held this course inadmissable on the ground that Congress did not intend to invest such authority in immigration officials, saying:

> "The findings and conclusions of the Board with relation to the petitioners, however, eliminate all physical and mental deficiencies legislated against. Shall it be said, under such a record, that the examining board can exclude an alien upon the conclusion that he is 'likely to become a public charge,' when, upon the facts found and reasons given, the applicant is not brought within the provisions of the act excluding him from admission? In the findings made there is no disqualification personal to the applicants, nor any objection made because of inability to conform to new conditions and relations. They are not excluded by the provisions of the act. The reasons given do not exclude them under the act. These reasons are proper subjects for the consideration of Congress, but they do not authorize the temporary suspension of the Immigration Act, which the adoption of these findings will do. The laws and principles upon which our government rests forbids the exercise of arbitrary power. Immigration officers must act within the powers given. Courts have power to intervene where they exceed their authority. *Ex parte,* Saraceno (C. C.), 182 Fed., 955; Lewis vs. Frick, (C. C.), 189 Fed., 146; *In re* Feinknopf, (D. C.), 47 Fed., 447; *ex parte* Koerner, (C. C.), 176 Fed., 479; *In re* O'Sullivan, (C. C.), 31 Fed., 447; United States v. Martin, (D. C.), 193 Fed., 795; Gonzales v. Williams, 192 U. S., 1, 24 Sup. Ct. 177, 48 L. Ed., 317."

It is true that this very decision was reversed on appeal by the Circuit Court of Appeals in *White vs. Gregory,* 213 Fed. Rep., 768, (9th Circ.), but the opinion of the appellate court scarcely meets the is-

sue, and seems to be predicated on the untenable theory that the courts will not

> "inquire into the sufficiency of probative facts, nor consider the reason for the conclusions reached by the officers,"

ignoring all the other authorities hereinbefore cited. As already pointed out (p. 39), the same Circuit Court of Appeals in *Healy vs. Backus,* 221 Fed. Rep., 358, materially qualified this holding by expressly conceding judicial review for the purpose of ascertaining whether there was any evidence justifying the result, "as there must be some evidence tending to their support; otherwise there would be error of law on account of which the courts would entertain jurisdiction. United States vs. Williams, 200 Fed. Rep., 538."

Moreover, it is submitted that it is inconsistent with the fundamental principles of our Government that administrative officers should be permitted unlimited discretion in deciding on what grounds they might exclude aliens, whether Congress did or did not vest them with authority to exclude because of economic conditions at destination. The cognizability of such matters is purely a question of law. (Contrast cases quoted *supra,* pp. 20, 39-40, 42, 60-2 and U. S., *ex rel.* Mylius vs. Uhl, 203 F. R., 152, aff.; 210 F. R., 860; and also Yick Wo vs. Hopkins, 118 U. S., 356, as to undefined arbitrary power in a "government of laws not of men." See also adoption by this Court in Hurtado vs. California, 110 U. S. 516, 535 of Webster's classical definition of "due process of law," as precluding unrestrained arbitrary power.)

There is a fitting sequel to the decision in *White vs. Gregory,* in the procedure involved in *Healy vs. Backus, supra,* where the Board of Special Inquiry was held to be justified in excluding Hindoos on the ground that they are the victims of race prejudice,

and thus likely to be more prone to become public charges, though it is common knowledge that persecuted races, like the Chinese and Hindoos, have in practically no known instances become public charges in this country, largely because of their deeper recognition of the ties of blood and race binding them to each other, often strengthened by this very prejudice. It is difficult to distinguish such a holding from the leading case of *Yick Wo vs. Hopkins,* 118 U. S., 356, which this Court recently at its own instance invoked as probably condemnatory of a statute apparently based on race prejudice, in *Quong Wing vs. Kirkendall,* 223 U. S., 59, 63. (Compare Secretary Bayard's view, *ante* pp. 45-6). It will also be noticed that in *Healy vs. Backus,* the decision here under review was cited with approval, but the two cases are distinguishable, because in *Healy vs. Backus, supra,* the evidence relied on, including affidavits, letters and newspaper clippings, was formally adduced, and the aliens given an opportunity to meet the same by similar proof, which they in fact did, and also for the further reason that, as is hereinbefore pointed out, *ante* (pp. 26-7), in deportation proceedings, as distinguished from proceedings before a Board of Special Inquiry, more leeway is permissible in the matter of receiving *ex parte* testimony, because on such application before the Secretary, as much time as may be convenient is afforded to examine the evidence with the aid of counsel and submit further proof to meet it, as distinguished from a summary hearing before the Board of Special Inquiry, followed by an appeal limited to the record made there.

(b) In fact, immigration automatically adjusts itself to economic conditions here, as was pointed out by Secretary Straus in his annual report of 1908 as Secretary of Commerce and Labor, the panic of

1907-8 leading to a reduction of 502,479 in the number of immigrants as against the year ending June 30, 1907, and the departure of 395,073 alien immigrants here in addition. This was also found by the Immigration Commission (Reports I, p. 188).

(c) Moreover, as is hereinbefore pointed out, boards of special inquiry are not constituted of men capable of passing on such complicated, difficult and ever varying questions as industrial conditions in a particular locality, as bearing on likelihood of immigrants destined to such places finding work there. Nor are there any satisfactory methods at hand for apprising boards of special inquiry promptly of such conditions, all of which goes to show that Congress did not intend to have boards of special inquiry suddenly take cognizance of these matters, particularly not under a statute in force for so many years, excluding persons likely to become public charges, under which such right was not claimed till the last few years. (See *ante*, pp. 62-5, 67-9, 47.)

(d) Moreover, immigrants desiring to settle in the United States are seldom wedded to their original proposed place of destination, and hence are quite ready to settle in some other locality, if economic conditions in the former place are unsatisfactory. Accordingly, the economic conditions in a particular place are not very important on this question. Note in this connection the work of the Information Division of the Department of Labor itself, hereinbefore cited, for distributing immigrants to places where work can readily be found, which is being so largely expanded at present; also its conference with State officials, with particular reference to farm labor, hereinbefore cited *ante* (p. 12), and the work of such immigrant removal societies as the Industrial Removal Office in New York.

POINT V.

Where the Courts on Habeas assume jurisdiction to review an order of exclusion, they are themselves to determine the question of admissibility, and not merely to remand relator for a new hearing to the immigration authorities.

This question has generally been regarded as settled ever since the decision of this Court in *Chin Yow vs. United States*, 208 U. S., 8-13, but recently in *United States vs. Petkos*, 214 F. R., 978, at 980, the Court distinguished that case, because there a claim to citizenship was involved, from the case of a conceded alien. In view of that decision, the question was recently carefully reconsidered by the Circuit Court of Appeals for the Eighth Circuit in *Whitfield vs. Hanges*, 222 F. R., 745, at 756, where the Court said, on review of authorities clearly sustaining its conclusion:

> "The order of the court below was that the appellees be discharged without prejudice to the right of the Bureau of Immigration to proceed against them in a lawful manner to prove, if it could do so, the grounds alleged in the warrant of arrest. The practice approved by the Supreme Court and generally prevailing, however, seems to be that the court which takes jurisdiction and custody of the alien under the writ of *habeas corpus* and finds that his hearing has been unfair, retains custody and jurisdiction of him and of the case, and tries on the merits *de novo* on evidence introduced before that court, the question whether or not the alien is guilty of the charges made against him in the warrant of arrest before

making his discharge absolute. Meanwhile the court has ample power to admit the alien to bail or to take his own recognizance. Chin Yow vs. United States, 208 U. S., 8, 13, 28 Sup. Ct., 201, 52 L. Ed., 369; United States vs. Williams (D. C.), 193 Fed., 228, 231, 232; *In re* Con Pon, 168 Fed., 479, 483, 484, 93 C. C. A., 635; *Ex parte* Petkos (D. C.), 212 Fed., 275, 278; *Ex parte* Koerner (C. C.), 176 Fed., 478, 479."

As was well pointed out by Judge Hand in *United States vs. Williams,* 193 F. R., 228, the Courts have no general authority to issue orders to immigration authorities, but their right to dispose of the alien arises under Section 761 of the Revised Statutes of the United States, regarding *habeas corpus,* requiring the Court to "dispose of the party as law and justice require." This necessarily requires the Court itself to decide whether the immigrant is or is not admissible, and not to merely remand him for the determination of the question by immigration authorities, naturally prejudiced against him by their prior adverse ruling.

POINT VI.

The orders of the lower court should be reversed and petitioners discharged.

Respectfully submitted,

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Supreme Court of the United States.

Ali Gegiow and Sabas Zarikoew, Petitioners, *against* Byron H. Uhl, as Acting Commissioner of Immigration at the Port of New York, Respondent.	No. 340.

REPLY BRIEF FOR PETITIONERS.

I.

The supposed limitation of the case by the petition for habeas corpus to the question of the absence of any evidence to justify exclusion.

Practically the whole of the Government Brief is addressed to the argument that as there was, it is claimed, *some* evidence justifying exclusion, petitioners cannot assail the exclusion for *unfairness of procedure, involving a denial of due process of law,* the Petition for *Habeas Corpus* having been, it is claimed, limited to the contention that there was *no evidence* justifying exclusion (Gov. Brief, pp. 2, 25, 46).

While absence of any such evidence was averred (fols. 4, 5) the petition also affirmatively alleged (p. 4, fol. 6):

> "*that said aliens have not been accorded the rights to which they are entitled under the constitution* of the United States, *and the statutes applicable thereto,* and their exclusion from the United States is *without due process of law.*" (Compare also fol. 5.)

Upon this petition, the writ of *Habeas Corpus* issued, and without challenging the sufficiency of the petition by demurrer or motion, or any objection as to its scope as a pleading, respondent filed a copy of all the evidence taken before the Board of Special Inquiry and on the appeal, as part of his Return (fols. 9, 12, 14-16, 20-1). Upon this evidence, the various points now argued were urged below, and it is submitted that the petition was clearly sufficient to raise these questions, but if, by any possibility, it would have been challenged as insufficient, the lower courts would have permitted the same to be amended, under the liberal rules as to amendment of pleadings enacted by Congress for the United States Courts by Sec. 954 of the U. S. Rev. Statutes, (which expressly requires such defects not raised below, to be disregarded on appeal), and particularly as to *habeas corpus* proceedings (Sec. 760). In fact, while the opinions below address themselves chiefly to the question whether there was *any* evidence justifying exclusion, in view of the prior decision of the appellate court that this would confer jurisdiction in immigration cases by *habeas* (See our main brief, pp. 37-9), Judge Lacombe in the U. S. District Court also noted that other questions were

raised, stating "there is apparently no irregularity in the proceedings," (fol. 43, also fol. 44)—the correctness of which proposition of law is here challenged—and Judge Ward, particularly, in the Circuit Court of Appeals, considers the error of procedure, establishing denial of due process of law, involved, in withholding the alleged industrial reports in question before the board and on the appeal to the Secretary (fol. 60). Under the authorities, the supposed insufficiency of the petition to raise questions other than the absence of any evidence, could have been cured by amendment, if raised below, and is not open when not there raised, in an appellate court, especially not after the writ issued and return was made to it.

Coburn vs. *Cedar Valley Co.*, 138 U. S. 196, 221-3.
Tuttle vs. *Claflin*, 76 F. R., 227, 237.
Roberts vs. *Reilly*, 116 U. S., 80, 93.
Mexican Co. vs. *Duthie*, 189 U. S., 76.
U. S. vs. *Lee Yen Tai*, 113 F. R., 465, 467 C. C. A.

See also our Assignment of Errors (fol. 47).

As expressly said by the Circuit Court of Appeals in *U. S.* vs. *Petkos*, 214 F. R., 978, 979:

> "The petition for the writ did not, it is true, allege any failure to give a fair hearing. But this objection does not appear to have been raised before the District Court in opposition to the issuance of the writ, and we cannot regard it as now available to the appellant."

Moreover, in view of the rule applicable to review in this Court, after grant of a writ of Cer-

tiorari, consideration on the merits of the important questions on which the writ was granted, should not be denied on such narrow grounds of supposed defects as to the scope of the pleadings, not raised below, and amendable there. (Friend *vs.* Talcott, 228 U. S., 27, 36; Greene Co. *vs.* Thomas, 211 U. S. 598, 601-2; *In re* Lau Ow Bew, 141 U. S. 583).

II.

No admission was made below by petitioners, as intimated by error in the Government brief (p. 25), that the hearing below was "fair, though summary," and that the only question was whether there was any evidence to justify exclusion.

The learned counsel for the Government has fallen into error in making this statement in his brief, on the supposed authority of our main brief in this Court (pp. 6-7). Our statement was that all the various questions here raised were raised below, and that *after* filing our petition for rehearing "in the Circuit Court of Appeals *on* the petition for rehearing, *counsel for the Government joined with counsel for petitioners* in phrasing the questions of law arising, applicable to relators, as follows" (mentioning all the questions here urged in our Points I to III, the U. S. Attorney declining to treat the 4th Point as open after White *vs.* Gregory). The fact is that counsel had requested the Circuit Court of Appeals to certify these questions, when the petition for

rehearing was filed below, and at the suggestion of one of the judges of that Court, counsel for both sides united in phrasing the questions in this way, for the purposes of aiding that Court in preparing a proposed Certificate to this Court. This simply presented different important questions of law arising on this record from the point of view of a certifying lower court, and the next two questions expressly raised alleged defects of procedure, involving alleged denial of due process of law, and relied upon to establish an *unfair* hearing. Moreover, to avoid misunderstanding on this very point, we expressly stated in our main brief in this Court (p. 7): "Concerning the first of these questions, petitioners of course do not concede that they were accorded a fair, though summary hearing, and the second and third questions suggested above, in fact affirmatively indicate that a denial of due process of law and even of the forms of a legal hearing, are involved."

III.

The objection raised in the Government Brief (p. 2) that the testimony before the Board was not attached to the petition, or excused, is not well taken, but is in any event not open in this Court, the writ having issued, the testimony being produced by respondent, and the objection being amendable, even if sound, had it been taken below.

Had the petition been attacked below for this ground, the defects, if any, would of course have

been amended, but that point was not raised, the writ issued and the evidence was attached to the Respondent's return, and the objection is not even open now. (See Cases cited *infra*, pp. 3-4). (See also McGlennan vs. Margowski, 90 Ind. 150, Matter of Kuhne, 57 N. Y. Misc. Repts. 30, 34; aff. 127 App. Div. 907; aff. 190 N. Y. 610).

But the objection is not valid, as applied to petitions for writs of Habeas Corpus in immigration cases, though it is applicable to efforts to review judicial proceedings from courts of record, where such haste is not necessary (Craemer *vs.* Washington, 168 U. S., 124; Anderson *vs.* Treat, 172 U. S., 24). This rule of practice should not be applied to immigration cases, where the papers are not lodged in a court of record and open to all, but are commonly unprocurable, or at least not promptly, except by the respondent himself, combining in himself the functions of complainant, judge and jailor, unlike a mere bailiff, and where some are often mere telegraphic orders of the Secretary, while on the other hand, the impending deportation is so imminent, after the Secretary's decision (and before that, habeas proceedings are premature) that Respondent's Brief contends seriously that the hearing before the Inspector, Board and Secretary should still take place in the interim, till the vessel sail again, commonly less than a week. These considerations obviously have only a limited application to deportation proceedings, unlike exclusion cases, as the respondent himself has in his possession all the papers in question, and often exclusively, in exclusion cases.

Relief by the exercise of the "great writ" should not be whittled away by judicial rules of practice, not even affirmatively expressed in the statute (Rev. St. Sec. 754; compare Sec. 761).

IV.

Some erroneous inferences as to the facts from the Government Brief.

(a) *There is no evidence in the record that relators have no property, other than the money mentioned in Respondent's Brief (p. 2), shown by them to the immigration authorities,* and even these statements were not elicited under oath by question and answer, but are simply read into the record from the ship's manifest (fols. 15, 20), and are often understatements, to avoid suspected pilfering. The burden of proof was on the Government to prove all facts it relies on, and this by appropriate questions (See our main brief, p. 32). On the other hand, the proffered aid from the near relative of Gegiow at Portland and Zarikoew's friend there—though not "legally obligated to support them,"—should not be ignored, as done in the Government Brief. In this connection it should be noticed that the line of authorities cited by the Government (Brief, p. 32) is not applicable, as to the expertness in reaching just results through daily practice of administrative officers involved, for this Court should notice judicially as part of the history of the times, facts mentioned in the printed reports of the Immigration Commission, that since Commissioner Williams' revolutionary erroneous orders, of a few years ago nearly all the established rules, constructions and customs were set aside, in this very connection, though the Commissioner of Immigration is not vested by any statute (Sec. 23 or any other) with legislative authority (See our main brief, pp. 14-16, 47-48, 63-5, and Vol. 41, Immigration Comm. Reports, pp. 161, 168-70).

(b) The learned counsel (Gov. Brief, p. 3) suggests that Gegiow persisted in saying that he would nevertheless want to go to Portland, even if informed that there are many unemployed there, but his answer is not an affirmative simply, as contended, but reads, in translated form, (fol. 15):

> "I was assured, and some others by their relatives, if you come and don't find any work they will support us for any length of time, until work picks up,"

and immediately before the ultimate exclusion, when asked if they had anything else to say why they should be permitted to proceed (fol. 26):

> "We are able to do any kind of work,"

and not merely in the negative, as stated in the Government Brief (p. 3).

In fact, there is no doubt that, rather than go back to Russia, they would have gone or will go anywhere in the United States, if they were apt to find better conditions there than among their relatives and friends in Portland. Nor was this recital of the alleged conditions anything but a pure assumption in the question, and of course Gegiow did not know his rights, nor the requirements of our Immigration Act.

(c) As Zarikoew speaks no English or Russian, according to Respondent's letter in the record, of course he could not understand, or by any possibility be deemed to have acquiesced, in the questions and answers put to Gegiow, nor, of course, in the examination of the other relators subsequently examined, even if he was near enough

to hear them, of which there is no evidence (Jackson *vs.* Builders' Woodwork Co., 91 Hun, 435, Tufts *vs.* Charleston, 4 Gray, 537; Parulo *vs.* Phil. R. Co., 145 F. 664), and of course there can be no waiver without knowledge, especially on questions of law.

(d) *Nor can Gegiow be reasonably regarded as apprised of the alleged industrial conditions and given opportunity to meet them by proof, because he aided, in the interpretation on the examination of other relators after* his case was decided. The relators were only permitted to answer questions, were denied counsel and friends, and not apprised of their rights to adduce further evidence, and could not have supposed that they had a right to break in, into the examination of the other aliens or were personally concerned in it, or to do anything but answer the questions. Moreover, as shown in our main brief (pp. 10-11), the mere joining of all these aliens in one hearing before the Court was unauthorized, improper and prejudicial, and cannot now create waiver by acquiescence in the other proceedings. Nor, despite the suggestion of the Government Brief (p. 3), was it incumbent on them before the board "to controvert the board's alleged opinion as to conditions of unemployment in Portland," but the burden was on the Government properly to prove such facts and advise them of their right to meet them. Counsel subsequently did challenge this proof for them, as affirmatively appears from the *Habeas Corpus* petition, and traverse, but the proof in question, though peculiarly in the possession of the Government and especially required to be produced by it because absent from the return, was not forthcoming, and this Court is still asked merely to speculate about it (Gov. Brief, pp. 50-1).

(e) As to the suggestion of counsel (Gov. Brief, p. 50), that we do not seriously contend that the *decision of the Board was not justified, assuming the proof of industrial conditions to be in the record—whatever it was, and assuming that it was not too remote in time*—we seriously reiterate our contention to this effect on the point (See our main brief, pp. 11-17, 10, 40-4, 66-7, 73-4). The Government continues to overlook the fact that these aliens were more favorably situated than the bulk of the inhabitants of this country, (who possess $34.90 in money only per capita), and ignores the absence of proof as to the property qualifications of relators, and their possession of relatives and friends in and near Portland, ready and able to aid them. It also ignores the fact that they are farm laborers, whose occupation is not congested and whom we need here badly. Counsel's assumptions would lead to the view that a majority of the inhabitants of this country became public charges in 1914, instead of an insignificant percentage, even of aliens residing here. In fact, as counsel finally puts the questions (Gov. Brief, p. 51), this Court is asked to exclude if there is any "*possibility* of (their) being likely to require public support," instead of finding competent evidence here of the "likelihood" of this happening, subject to deportation any time within three years, if they should. So also, in the absence of a notation on the record that the appearance of the aliens impressed the board unfavorably that suggestion of the Government's Brief (pp. 31-32, 33-4, 51) is not even open (see cases in our main brief, pp. 23-4, 34-7).

V.

The contention of the Government Brief (pp. 8, 10, 16) that Congress may constitutionally make any decision of immigration officers, excluding conceded aliens, absolutely non-reviewable in the courts, is not here involved, but we contend that the statute does not make the decisions non-reviewable, except on the facts, and that the statute must be construed subject to the due process of law provisions of the Constitution, and so as to avoid breaking treaty faith, and that the decisions of this Court, in line with those of the lower courts, do not leave the question of reviewability open, to ascertain whether there was a fair hearing or any evidence to justify the exclusion.

(a) *That there is a right to some judicial review to determine whether "due process of law" was accorded the alien on application to enter, is indisputable under the well-considered authorities, as also that the absence of any evidence, requires judicial revision.*

Japanese Immigrant Case, 189 U. S., 86.
Chin Yow vs. *U. S.,* 208 U. S., 8.
Zakonaite vs. *Wolf,* 226 U. S., 272, 274.
Lewis vs. *Frick,* 233 U. S., 291, 297-300.
Low Wah Suey vs. *Backus,* 225 U. S. 460.
Tang Tun vs. *Edsell,* 223 U. S., 673.
Interst. Comm. Comm. vs. *L. & N. R. Co.,* 227 U. S., 88.

See also the able decisions in the lower courts cited in our main brief (pp. 39-44, 18-31), including apparently every Circuit Court of Appeals in the country (even the 9th Circuit having just qualified its holding in White *vs.* Gregory, by adopting the rule of the U. S. Circuit Court of Appeals for the Second Circuit in U. S. *vs.* Williams, 200 F. R., 538, in the recent case of Healy *vs.* Backus), (see our main brief, pp. 39, 72). In view of this unbroken line of authorities, we confidently submit that the question is no longer open.

Nor is it material, for present purposes to inquire whether the federal courts are vested with such jurisdiction by the express provisions of the Immigration Act, conferring jurisdiction on the United States courts (Sec. 29), or the *Habeas Corpus* provisions (see our main brief, p. 40), or by the Constitution itself, in its provisions forbidding suspending the writ of *habeas corpus* except in war time (Art. 1, Sec. 9, Cl. 2) or its "due process of law clause" (5th Amendment).

In fact, the learned counsel for the government, while substantially ignoring the decisions of this Court above cited on the point (and *absolutely ignoring all those of the lower courts, on the point, cited by us*), in effect attempts to secure a reversal by this Court of its own decisions, though not avowedly. The cases of Nishimura Ekiu *vs.* U. S., Lem. Moon Sing *vs.* U. S. and Ju Toy *vs.* U. S., were before this Court in the later cases relied upon by us, as also before the lower courts, and arose under different statutes, and despite occasional passages which might tend to support the Government's contention, apart from their context, and the precise question decided, were dis-

tinguished in the later cases, here precisely in point.

Nor is there any difference in principle, between judicial review in deportation proceedings and immigration entry cases, despite the Government's contentions to the contrary, both being made non-reviewable and summary by statute, and both being governed by the same constitutional restraint or alleged absence of *restraints* (*Japanese Immigrant Case, supra;* Fong Yue Ting *vs.* U. S., 149 U. S. 698). In fact, scope of review is broader in exclusion cases, because there Congress has expressly established a procedure (Sec. 25) requiring a "hearing" before a "board" on "testimony," all of which must be reduced to writing and submitted to the Secretary on an appeal, unlike the more drastic deportation provisions (Sec. 20 and 21).

(b) *In reaching this conclusion, all related decisions under other laws than the Immigration Laws are expressly treated as inapplicable in the Government Brief, including the case of Inter-st. Comm. Comm. vs. L. & N. R. supra, in which the immigration cases were considered in the briefs* and the opinion, and this Court advisedly used language excluding such arbitrary power in *all* cases, including therefore the Immigration Officers (See our main brief p. 61). On the other hand, decisions under the Customs Laws are relied upon as analogous (Gov. Brief, pp. 13-14), and the fact overlooked that later authoritative decisions under those acts have expressly authorized judicial review, despite similar statutes, where wrong theories were applied in appraising or where there was bad faith or a total absence of evidence (see our main brief (p. 40; also Macy *vs.* Browne, 224 F. 359, C. C. A.).

(c) In fact, *after first arguing baldly that Habeas Corpus will not issue in an Immigration case at all, no matter how flagrant a denial of due process of law is involved, as long as a decision was made by the immigration officers* (Gov. Brief, pp. 14, 16, 20), the learned counsel for the Government *finds himself compelled by the express decisions of this Court, to except four classes of cases, in which judicial review is permitted,* though he still continues absolutely to ignore all the C. C. A. decisions contrary to his contentions, precisely in point:

(1) "The decision, in order to be the kind to which the statute constitutes the condition of exclusion, must be an *honest one, made in good faith*" (Chin Yow Case) (Gov. Brief, p. 24).

(2) or, *it must not be assailable "on the ground of fraud or unfairness"* (Gov. Brief, pp. 25, 29, compare 19),

(3) at least, as *to matters which the Inspectors may determine by the use of their eyes, the decision is non-reviewable, whether the record discloses any such defects or not, and the determination of physical and medical defects is not vested exclusively in the Government physicians* (Gov. Brief, pp. 31-2, 33-4, 51),

(4) *apparently, a distinction is also made in favor of reviewability in deportation cases as distinguished from exclusion cases* (*Id.* pp. 16, 40-3) *because not required to be so "summary".* In addition it is expressly conceded that *habeas* may issue to ascertain if there was *any* decision (Gov. Brief, pp. 10, 36, 40).

(d) As above suggested, the learned Solicitor General practically ignores the contentions made

below, and reiterated here, that *the board's decision was grossly unfair* (even if unintended by the executive officers), on the untenable theory, above considered, that the allegations of the petition in *Habeas* limit us to the point as to absence of *all* evidence; this was considered *ante,* pp. 1-4. But in considering what hearings are "unfair" under this rule, the learned Solicitor General limits the meaning of the word "unfair" most remarkably, more so, in fact, than would be justified, if we were dealing with a suit against the administrative officers for misconduct, instead of an appeal through the great writ, to the courts, for the rectification of injustice to relators and their acquisition of their personal liberty. The Chin Yow Case is quoted (Gov. Brief, p. 24) to the effect that the departmental decision must be one, to have finality, "after a hearing *in good faith,* however summary in form," which is properly construed as authorizing review where the hearing was not "honest or fair" (*Id.* pp. 25, 29). As above pointed out, that language in its reference to "fairness" is ample to embrace the errors of procedure here involved, and this Court used it to include *arbitrary "denial of such hearing and of such an opportunity to prove his right to enter the country, as the statute meant that he should have"* (quoted in our main brief, p. 21), but this Court has since then, in cases not involving claims to citizenship, used unmistakable language, showing what "unfairness" is thus reviewable. In the Tang Tun Case, the scope of review was described as embracing affirmative evidence that "the executive officers have acted *in some unlawful or improper way, and abused their discretion"* (*Idem,* p. 28). In Low Wah Suey *vs.* Backus, it was described as *'action of the executive of-*

ficers . . . such as to prevent a fair investigation."

In Lewis *vs.* Frick, *supra*, and Zakonaite *vs.* Wolf, *supra*, it *was absence of all evidence to justify exclusion* (*Id.* p. 37), and in Interst. Comm. Comm. vs. L. & N. R. Co. (Idem, pp. 60-2), it was, as here *administrative boards, assuming unproven facts, and thereupon withholding opportunity to know what the evidence was, relied on by the adverse side, and opportunity to meet it on the "hearing"*. The Court in Ex. p. Petkos, 212 F. R., 275, mod. 215 F. R., 978, ably discusses what "a fair hearing" requires under this rule, expressly applying the holding of this court in the last cited case, as does also the Court in Whitfield *vs.* Hanges (quoted Idem, pp. 50-55).

(e) *That the physical conditions of the alien may not be considered disabilities, by the Board under the present Act, unless certified by the Government medical officers, certainly in the absense of notation thereof in their record, was shown, under the authorities in our main brief* (pp. 23-4, 34-7).

(f) It is also urged by the Government that *the supposedly necessary "summary" character of exclusion cases,* even as distinguished from deportation cases, precludes judicial review there. It has already been pointed out *ante* (p. 13), that the decisions are fatal to the theory that there is such a distinction in principle. This distinction is supposed to rest on necessity, because of supposed lack of facilities for housing the immigrants aboard ship or at Ellis Island and the dangers from contagious disease (Gov. Brief, pp. 17-18, 21). This Court, as far back as The Japanese Immigrant Case, however,

pointed out, that the rights and liberty of the individual must be regarded, as well as "the prompt, vigorous action contemplated by Congress" (quoted in our main brief, p. 19), and it is difficult to conceive of language requiring more "summary" methods than that used in the deportation sections (Sections 20 and 21), while, on the contrary, the exclusion section uses no terms expressly requiring "summary" procedure (Secs. 22 and 25), but in terms qualifies the same by the use of the words *"if practicable"*. In fact, the difficulties suggested as to resulting over-crowding at Ellis Island (Gov. Brief, p. 17), are purely imaginary, the Government having gotten along very well all these years, without employing the revolutionary innovations here challenged. But, on the contrary, there is still ample authority to detain the aliens on ships of the line bringing them over, a course occasionally resorted to, where the steamship companies denied liability for refunding the expense of detention at Ellis Island, and constantly at some other ports, and there is the same right to bail, as exists in deportation cases, invoked by the Government, there being no statutory prohibition. In fact, in our *Habeas Corpus* statute (Sec. 761), Congress expressly provides for a summary hearing, and no one has yet been found bold enough to urge that this authorizes such denials of due process of law in our courts, as are here involved, though concededly all the rules of pleading, procedure and evidence are not supposed to be applicable to administrative hearings. But, as said by this Court in Interst. Comm. Comm. *vs.* L. & N. R., *supra*: *"But the more liberal the practice in admitting testimony,*

the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended."

(g) But in order to emphasize the "summary" character of the immigration entry cases. the learned Solicitor General deals with the *extreme cases of non-reviewability of orders preventing the entry and penalizing the bringing over of aliens suffering from contagious disease* (Gov. Brief, pp. 10-12, 17), especially Oceanic Steam Nav. Co. *v.* Stranahan). The complete answer to this exceptional kind of exclusion, *effected by quarantine officers* and *not by Immigration Inspectors,* is to be found in the leading case of Davidson *v.* New Orleans, 96 U. S., 97 at 105, cited by the Government (p. 17), that "due process" in administrative cases must be *"appropriate to the nature of the case."* Naturally, the preservation of the public safety from contagious disease authorizes more summary methods. appropriate to that end, than the exclusion of aliens, claimed to be likely to become public charges. Moreover, conceded citizens as well as aliens, may lawfully be thus prevented from landing, so obviously no peculiar questions of due process of law on applications of aliens to enter is there involved.

(h) So also the Government (Brief, p. 22) cited and relies upon the case of Pearson *v.* Williams, 202 U. S., 281. It would seem to be a sufficient answer to that case to point out that its holding was that admission by the immigration authorities of a contract laborer, does not bar subsequent proceedings, on a fuller record, for his *deportation* on that ground, as the evidence in the original proceedings is necessarily apt to be in-

complete, and the proceeding summary. Yet this case is cited as authority to cut down, more even, the right to due process of law in the original proceeding, in favor of an alien denied counsel or advisors, compulsory process for securing testimony and full review on appeal, whose rights cannot be reviewed *de novo* at all, as his actual deportation makes a review of his application merely an academic question! (See U. S. *vs.* Arnold, 82 F. 769 and Jacobs *vs.* Beacham, 221 U. S. 271.)

(i) In making his contentions, counsel for the Government of course relies almost wholly on cases under the Chinese Exclusion Laws. As pointed out, in our main brief, these have been repeatedly held to be largely inapplicable to cases under the general immigration laws (p. 26) for the former statutes were drawn on the general theory that Chinese persons were to establish right of entry by certificates in all cases, and the burden of proof was expressly put on the Chinese person by the statute, unlike immigration cases in general, where it is on the Government (See our main brief, p. 32). Accordingly, when it was held that this burden of proof provision did not require acceptance even of uncontradicted testimony for the Chinese applicant, it naturally may follow, as intimated, that the total absence of evidence justifying exclusion did not itself authorize judicial review, in the absence of affirmative proof of unfairness. Obviously, this rule is inapplicable to general immigration cases, and this in itself distinguishes all the Chinese cases relied upon by the Government. Incidentally it may be observed, however, that the citation of the case of Low Wah Suey *v.* Backus, 225 U. S., 460, 470 (Gov. Brief, p. 46) as authority for the proposition that "the right of counsel to ap-

pear has been denied" even in deportation cases, is erroneous, the passage involving merely the right of an Inspector to secure admissions from the alien on arrest without the presence of counsel, and it is expressly pointed out that counsel was thereafter allowed and acted (See our main brief, p. 25).

(j) The decision of this Court in U. S. *vs.* Ju Toy, 198 U. S., 253, is particularly relied upon by the Government. In this connection it is interesting to note the analysis of this decision, prepared by Mr. Justice McReynolds, to show its limited scope, immediately after this Court had handed down its decision, he having argued it as counsel for the Government. He said (Outlook, June 3rd, 1905):

> "The Government was of opinion that Congress had constituted the immigration officers a special tribunal to try all matters of fact —*not law*—relating to the right of an applicant to be admitted into the United States, and that in habeas corpus proceedings *the findings of fact made by them* should be treated by the court as conclusive unless directly impeached in some one of the well-understood methods, e. g. for *fraud or manifest wrong*, or *because no evidence supported it.* It maintained that, as an investigation by the officers was imperative under the statute, and was absolutely essential to the orderly administration of the law, some effect should be given to their decision, and that the Courts should not entirely ignore their action and proceed to try the whole case anew because of a bare claim of citizenship. In the Ju Toy case, the Court sustained this position. While the case in question arose under the Chinese exclusion acts, the principle involved applies to all our immigration laws. The result is to give the

findings of immigration officers upon all questions of fact—including the facts as to citizenship—conclusive effect unless such findings or the proceedings before them, are in some way directly impeached. In other words, the ruling which those officers are required to make is binding on one who seeks admission, unless alleged and shown to have been wrongful, and an entirely new trial in Court cannot be secured by simply alleging citizenship and without reference to the original examination. This doctrine is not novel, and has been applied many times by the Supreme Court."

The decisions of this Court in Tang Tun *vs.* Edsell, 223 U. S., 673, and Low Wah *vs.* Backus, 225 U. S., 460, also relied upon by the Government (Brief, pp. 48, 46, 41) are thus distinguishable for this reason, and also because the deportation procedure was involved in the latter, and not the explicit provisions of Sec. 25 of the Immigration Law here applicable (see our main brief, pp. 28-31, 26-7, 31-2). Moreover, the *Tang Tun* case *was an entry, not a deportation, case and expressly recognized judicial reviewability.*

The peculiar provisions of the Chinese Exclusion Laws as distinguished from Sec. 25 of the Immigration Act, also account for some dicta in other earlier Chinese cases cited by the Government, not followed in the later cases we rely upon, such as Lem Moon Sing *vs.* U. S., 158 U. S. 538; Lee Lung *vs.* Patterson, 186 U. S. 168, etc. (quoted in the Gov. Brief, pp. 22-4, 26, 37-8), and concededly every petty error of law, such as the reception of hearsay or other incompetent testimony, will not necessarily justify judicial reversal, even if it might require a reversal, if a direct appeal

were allowed. In fact, however, these cases have since been expressly limited, even in Chinese cases.

(k) The Government, of course, lays much stress on the case of Nishimura Ekiu *vs.* U. S., 142 U. S., 651, the only case cited by Judge Lacombe below, but it practically ignores the material changes since made in the statute, now Sec. 25 of the Immigration Law, in the direction of according a "hearing" instead of mere "inspection," establishing a quasi-judicial tribunal called a "board of inquiry," requiring them to keep "a complete permanent record of their proceedings and of all such testimony as may be produced before them," and a hearing on the appeal "solely upon the evidence, adduced before the board," and on the other hand leaving the matter of discovery of all *physical* and mental defects to other persons than the board, the latter to act on the physicians' certificates merely on those points, which is often conclusive upon them. The Government brief (pp. 33-4) refers to this last factor as if this were the only change in the Act we rely upon in this respect. (See our main brief, pp. 31-37). But it is desirable to note the exact facts involved, under the then Act of 1891, in the Nishimura Ekiu case. There a Japanese woman was excluded, who informed the inspector (p. 652) that she was twenty-five years old, her passport stating that she was accompanying her husband, contrary to the fact, and who stated that she desired to join her husband here, she not knowing his address even. She had $22 and

was to stop at some hotel till her husband called for her. The respondent produced her in answer to the writ, and reported that he had excluded her as "a person without means of support, without relatives or friends in the United States, and unable to care for herself and liable to become a public charge." It is of course well known that Oriental women are not themselves breadwinners and shun the society of all men, other than their immediate family, and this woman had no occupation of her own at all. The Act at that time, as noticed in our main brief (pp. 32-3), required merely an "inspection," though there was a purely optional authority to take evidence under oath, and "it did not appear that he (the inspector) took testimony on oath," and he made "no record of any testimony" (p. 663). Moreover, there was then no mandatory requirement for a medical examination, even, of *all* immigrants, much less a "physical or mental" examination, by the Government physicians. Under this Act, this Court held that there was no authority to substitute its views for those of the Immigration authorities, or to take evidence in Court as to the facts, and there was scarcely any opportunity, without a record even, to *review* the action of the inspector. An entirely different question was involved than now arises under Sec. 25 of the Act of 1907, and on the facts, the decision of the Inspector was clearly right that this alien was likely to become a public charge and in line with the other cases as to likelihood to become a public charge cited in our main brief (pp. 40-1, 42-7). No question of unfairness or absence of any evidence was actually involved.

(l) Accordingly, it is also submitted that the Government's contention (Brief p. 10) that

"mere inspection" would still be a constitutional method of dealing with applications to enter, is not here in any way involved, in view of the unambiguous provisions of the present Act, and the much more complicated questions of law and fact now arising, make it at least doubtful, under the later authorities, if a mere "inspection" law would be valid to-day, if Congress were so cruel as to enact it as a test of the present requirements of admission, to say nothing of reviewability for unfairness, fraud, or absence of any evidence (See our main brief, pp. 31-2).

(m) Similarly irrelevant and moot are the further contentions made in the Government Brief (p. 9), that a statute would be valid, despite Yick Wo *vs.* Hopkins, arbitrarily excluding all persons of a particular race, in the absence of treaty authorization, such as underlay the exclusion of Chinese and Japanese. It is also obvious that the argument is fallacious, that, even if Congress might validly under the Constitution exclude certain classes of aliens, no Constitutional provision *can* secure due process of law on applications to enter, in the absence of such prohibition. The decisions of this Court, and particularly The Japanese Immigrant Case and the Chin Yow case, to say nothing of the decisions in the lower courts, show that "due process of law" does govern applications to enter, in the absence of a prohibition of immigration. One might argue equally well, for example, that because a particular employment might be regulated or forbidden, the legislature, while authorizing the same, may exact utterly unreasonable methods of entering into it (Smith *vs.* Texas, 233 U. S. 630; Peo. *ex rel.* Copcutt *vs.* Yonkers, 140 N. Y. 1; Fire Dept. *vs.* Gilmour, 149 N. Y. 453). In view of the

express provision in Magna Charta (quoted in our main brief p. 18), it certainly seems clear that denial of due process of law on applications of aliens to enter would be violative of the Constitutional provision on the point. But in fact, no constitutional question is necessarily at present here involved, this case coming here on Certiorari, and Congress having, it is contended, prescribed proper and constitutional methods for passing on applications to enter, but the administrative authorities have improperly disregarded the same, and violated the due process of law necessary even in an administrative hearing. The opinion of Judge Seaman for the Circuit Court of Appeals in ~~Frick vs. Lewis, 195 F. R., 893~~ (quoted in our main brief, p. 41), is here very much in point, also, that

> "final determination of the statute applicable to the case and interpretation (to say the least) of the grant of power therein, cannot rest with the executive officer, under any authority cited, nor can such finality of executive decision have sanction under our system of government."

(n) In contradistinction to the views of the Inspectors here involved, under the influence of novel and erroneous views forced upon them some time ago, instead of their prior "expertness born of experience in practice," we invoke an able opinion of Secretary Nagel, on the question of "likelihood to become a public charge," rendered on March 8th, 1911, in the middle of his term, and showing that he recognized that other views had prevailed below. It is particularly significant because it is known that scarcely any alien over 45 can enter, without being certified for "senility" (in the medical sense), and applicant was going to relatives not legally obligated to support him:

"*Memorandum in the Case of Peisach Milkewitz*:

In this case I am not able to concur with the recommendation. It is true the alien leaves a wife and daughter abroad, but it appears that both of them are healthy and the daughter is of age. The alien is destined to immediate relatives in Chicago who are well-to-do. It is true that he has only a small sum of money, but it is ample to carry him to his destination, and there is nothing in the record to indicate danger of his becoming a public charge in the immediate future. To bring him within the provision of the law we would have to assume that a man fifty or perhaps fifty-five years old, as the case may be, without money at this time, is liable to become a public charge before he dies. This may be a reasonable assumption, but in my judgment it is not sufficiently safe for such a conclusion as the law contemplated when it gave us the power to exclude.

The alien will be admitted."

Unfortunately, such opinions as these are not published, and they might as well not be rendered at all, as they do not reach the Inspectors, for their guidance. This is all the more remarkable because even the present Immigration Act provides in Sec. 1, that the "immigrant fund" derived from collection of the $4. per capita tax shall be employed in part,

> "to defray the expense of * * * the cost of reports of decisions of the Federal courts, and digests thereof for the use of the Commissioner General of Immigration."

Obviously, these immigration law reports and digests were intended for the use of the subordinates of the Commissioner General, and the draftsmen of this disregarded law did not intend to

establish for the immigration service, "a government of men, and not of laws." This provision is also significant, as suggesting legislative intention to permit judicial decision on the questions arising, subject to non-reviewability on the facts. Of course the question whether there is *any* evidence is a question of law (Wiborg *vs.* U. S., 163 U. S. 659).

(o) It is also suggested in the Government Brief (pp. 30, 36) that the statute does not require the Board to state the grounds for its decision, and that errors in this respect are therefore non-reviewable. Whether the statute does or does not so require, there is, however, adequate authority in the Secretary and the Commissioner General to require such *findings of fact* to be made which are uniformly required and made, under the authority to prescribe regulations and administrative procedure (Sec. 15; Fok Yung Yo *vs.* U. S., 185 U. S. 296). Obviously, there could be no intelligent review by the Secretary on appeal without such requirement, and in fact, it would be impossible to ascertain otherwise, if an appeal from an exclusion for likelihood to become a public charge lies or not, as decisions based solely on medical certificates are not appealable, at all, though a bond may be given in some cases (Secs. 10, 26, and Rules of the Secretary Nos. 6, 20, etc.). In fact, however, in prescribing that the boards "*shall keep a permanent record of their proceedings* and of all such testimony as may be produced before them" (Sec. 25), it was intended to require the Board to specify such grounds for their determination, just as it was held that the boards must state, even before the regulation to that effect, that notice of the right to appeal was given the alien, otherwise the con-

trary must be inferred, and physical defects observed (if cognizable at all by the Board without a medical certificate) must be specified (See our main brief, pp. 23-4, 36-7). At an early date the courts required the inspectors unambiguously to specify their grounds for exclusion, and (as suggested *infra*, p. 20), they are necessary in order to constitute *findings of facts* unreviewable on the facts. The supposed "*other reasons*" (R., fol. 26) are unsupported by such necessary findings. (In re O'Sullivan, 31 F. R. 447; In re Kornmehl, 87 F. R. 314).

(p) It is also urged that various decisions of this Court, forbidding review on *habeas* of alleged absence of *any* evidence, in criminal cases, are in point (Gov. Brief, pp. 26-9). However, it scarcely requires argument, to show that these turn simply on the principle that other *judicial* methods of review, by writ of error or the like, are the exclusive methods available for such review, especially in criminal cases, in which at common law, there could be no review on appeal at all.

(q) It is rather significant that the *Government Brief, even now, seems to take no position, pro or con, on the important underlying question whether Congress granted, or intended to grant power to the immigration officers to consider as a factor, alleged industrial conditions at the proposed destination.* Surely the question whether such "power was intended to be granted," is a judicial question, as also the question *whether administrative officers may exercise such power under a statute, repeatedly re-enacted, using terms constantly construed authoritatively as not grant-*

ing such authority (Main brief, pp. 70-4, and U. S. *vs.* Hermanos, 209 U. S. 337, U. S. *vs.* Sherman, 237 U. S. 146, 150).

(r) *It will also be observed that no cases are cited, contravening our cases, which hold that such alleged industrial conditions may not be noticed judiciall in courts, (nor in administrative tribunals) and that the matter intended to be used as a basis for judicial notice must be adduced, and called to the attention of the adverse party.* The instance case is the only one which has so held, even as to administrative tribunals, and it was followed, under the usual rules of comity, but under distinguishable facts, in Healy *vs.* Backus (see our main brief, pp. 72-4). It is believed that there are no others, sustaining the Government's claim of such right, even for administrative tribunals. On the other hand, we desire to amplify the cases (main brief, pp. 58-9), requiring production and notification in court to the adverse party, of matters relied on for judicial notice, by reference to

Nagle vs. *U. S.*, 145 F. R., 302, 306, C. C. A.

(s) Some incidental comments in the Government Brief also deserve attention. In stating our contentions (Gov. Brief, p. 7), the fact is overlooked that unfairness and abuse are predicated also upon the fact that, even if the board did not draw entirely upon its imagination, in assuming that there were such newspaper reports published as is intimated, the same were not submitted to the Secretary on appeal, either, despite the statutory requirements but merely their alleged unfavorable summarization (see our main brief, pp. 21, 27-8, citing Davies *vs.* Manolis, 178 F. 818 and the Con Pon case (168 F. 479) which are directly in point, and which the Government acquiesced in). So also, the Gov. Brief (p. 8)

treats the alleged industrial reports as "hearsay evidence", whereas they were not "evidence" at all, were not sworn to, and were not produced, though an influential factor in the decision.

The Government Brief (p. 5) quotes from Sec. 24 of the Act, which adds to the authority to "Immigration officers" to administer oaths, the further phrase "*and where such action may be necessary, to make a written record of such evidence.*" It will be observed that this language is broad, and applies to other officers, besides members of the board of inquiry, such as persons investigating alleged violations of law, and particularly the "examining inspectors," dealt with in this very section, who examine, necessarily hastily, *every single immigrant* "on the line", having no time to write down their examination, and detain such as do not appear "to be clearly and beyond a doubt entitled to land", "for examination by a board of special inquiry". The next section deals with the board of special inquiry, which in contradistinction is required "to keep a complete permanent record of their proceedings, and of all such *testimony* as may be produced before them." The term "testimony" of course denotes *sworn evidence*, and so it has been held repeatedly (Petitioner's main brief, pp. 55, 52-5, 60-2). Of course, if Congress had intended to continue a system of mere "inspection," it is absurd to suppose it would have amended the Act of 1891 by inserting all the then meaningless provisions of Sec. 25 (see the Gov. Brief, p. 30). So also, the Government argument (Brief, p. 31) that the provision that the Secretary shall hear the appeal "solely upon the evidence adduced before the board" does not require the board to reduce all the evidence to writing. would reduce the appeal to an absurdity, such as is unknown

with respect to any reviewing authority. It is true that it is in form a "limitation", on the Secretary's power, but a usual one, designed to require some official to see the witness face to face and enabling him to be orally examined, and it has nothing to do with the supposed "summary" character of the hearing, the fact being that the Secretary occasionally sends the case back to the board, to enable additional evidence to be taken, to be thereafter submitted to him on the appeal.

In fact, as heretofore indicated, the Government Brief is largely based on the supposed "summary" requirements of the law. In fact, however, as pointed out hereinbefore, the statute expressly qualifies this requirement by the use of the words "if practicable" in Sec. 19 (Gov. Brief, p. 21), and even more drastic language has been authoritatively construed as permitting bail on appeal. (In *re* Ah Tai, 125 F. 795, Chin Wah *vs.* Colwell, 187 F. 592, C. C. A.), while the phrase "if practicable" has itself been repeatedly construed to give reasonable leeway for special circumstances involved, as distinguished from "immediately" (Walbridge *vs.* Brooklyn Trust Co., 143 N. Y. App. Div., 502, 508-9 and cases cited).

In spite of the intimations of this Court that a provision similar to Sec. 25 as to hearings before the board being required to be "separate and apart from the public" is intended merely to exclude the general public, except in such cases as a court also might properly temporarily exclude future witnesses (U. S. *vs.* Sing Tuck, 194 U. S. 161, 169-70, 176-7; Low Wah Suey *vs.* Backus, 225 U. S. 460, 470), the Government Brief (p. 46), construes it even as excluding counsel, and on the basis of this limited construction,

would still further whittle away whatever rights are left, by denying right to cross-examination (pp. 46-7), and a right to knowledge of the evidence and opportunity to rebut it, (p. 47) ignoring *Interst. Comm. Comm.* vs. *L. & N. R. Co., The Japanese Immigrant Case,* the Chin Yow case, and all the cases in the lower courts cited in our main brief, a mere reference to which answers these contentions. In fact, however, these very terms were ably construed by Roosevelt's Ellis Island Commission, which included such able lawyers as Judge Philbin and A. von Briesen, and said: "The use of the word 'public' in connection with any court proceedings has never been held to exclude persons interested in the proceedings" and they recommended promulgating a rule under the subsisting statute, "that the boards of special inquiry shall admit to their sessions the parties in interest, with opportunity to propound questions and produce witnesses, such parties in interest being the representatives of the transportation companies and the representatives of the immigrant." (See, also, as to the right to counsel in such cases, Murdock *vs.* Trustees, Phillip Academy, 12 Pick., 244, 263, Peo. *ex rel.* Van Hise *vs.* Police Comm., 58 Hun, 224, Peo. *ex rel.* Elliott *vs.* Tilford, 64 App. Div., 209, Hightower *vs.* Hawthorne, 12 F. C. 6478b, and as to the right of cross examination, besides Whitfield *vs.* Hanges, *supra,* and Int. Comm. Comm. *vs.* L. & N. R., *supra,* see Peo. *ex rel.* Fallon *vs.* Wright, 7 App. Div. 185, aff. 150 N. Y. 444). But, despite the Government's claim (Brief, p. 46), we expressly conceded in our main brief (p. 16) that *all* the incidents of judicial "due process of law" were not intended to be conferred, such as pleadings and all the judicial rules of evidence.

The Government Brief (pp. 13-14, 45, 47-8) emphasizes the supposed analogy of certain customs cases, such as Auffmordt *vs.* Hedden, 137 U. S. 310 and Buttfeld *vs.* Stranahan, but, as hereinbefore already pointed out (*ante,* p. 13), overlooks the fact that the later customs cases have also accorded judicial review under those statutes, where there has been unfairness, a wrong method or an absence of all evidence. But such cases as Auffmordt *vs.* Hedden, *supra,* are entirely distinguishable, dealing as they do, with the right of Customs Appraisers to appraise goods in the absence of the importer, who is, however, expressly given an opportunity, by notice of dissatisfaction and sometimes thereafter by protest, to review the appraisement on appeal and adducing further evidence himself. It should be remembered that the impersonal appraisement of *market value* of merchandise does not involve any matter of fact, peculiarly within the knowledge of the importer, and he files his sworn invoice at the start, to show the price he paid for the goods, the idea being to treat all importers alike by valuing the same goods at the same price, without reference to a particular importer's advantages in buying cheap.

Tiaco *vs.* Forbes, 228 U. S. 549, involved merely an exceptional exercise of legislative power as against certain aliens in the Philippine Islands. It is suggested that Inspectors may use their eyes, without evidence, to the extent of excluding children they find, on inspection, to be less than 16 years old (Gov. Brief, p. 32). The language of the statute seems to be against this view, and it is not apparent, why evidence, instead of unreliable inspection, should not be resorted to.

But as there is some authority that courts and juries may resort to such "demonstrative evidence," possibly, in that special case, boards of special inquiry (as well as the physicians), may, just as they probably may also take judicial notice of such matters as courts might, but subject to the judicial rule of stating the fact on the record in the presence of the alien, and giving him an opporunity to meet the matter.

The Government Brief also overlooks the fact that the line of early and *extreme* cases under the Chinese Exclusion Laws, such as Lem Moon Sing *vs.* U. S., 158 U. S. 538, and Lee Lung *vs.* Patterson, 186 U. S. 168, already considered *ante* (pp. 19, 21-2), are really limited by the later decisions which we rely upon, such as The Japanese Immigrant Case, Chin Yow *vs.* U. S., Interst. Comm. Com. *vs.* L. & N. R. Co., and specifically in Downes *vs.* Bidwell, 182 U. S. 283. *In re* Gottfried, 89 F. R., 9, Lavin *vs.* Lefevre, 125 F. R., 695, *Ex p.* Fong Yim, 134 F. R., 939, Hopkins *vs.* Fachant, 130 F. R., 841 and Lee Gon Yung *vs.* U. S., 185 U. S. 306 at 307, recognizing that illegal regulations and procedure will render a decision reviewable as in *In re Kornmehl*, 87 F. R., 314, (Lacombe, J.), a point in Judge Lacombe's mind in the instant case too (R. fols. 43, 44).

(t) *It should, of course, be noticed that under the authorities relied upon, grave unfairness and abuse of procedure requiring petitioners' discharge, are involved, whether the Court may or may not inquire whether there is any evidence justifying exclusion, and whether it should or should not conclude that exclusion was justified with the proof in question regarded as properly admitted.*

VI.

The order appealed from should be reversed, and petitioners discharged.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

ALI GEGIOW AND SABAS ZARIKOEW, PETITIONERS,
v.
BYRON H. UHL, AS ACTING COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK.

No. 340.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

STATEMENT OF THE CASE.

This case comes here on certiorari to the Circuit Court of Appeals for the Second Circuit, which affirmed an order of the District Court dismissing a writ of *habeas corpus*. (215 Fed. 573, C. C. A.; 211 Fed. 236, D. C.)

The petition for the writ of *habeas corpus* alleged that the relators were aliens; that they arrived at the port of New York by the steamship "CZAR" on February 5, 1914; were accorded a hearing before the board of special inquiry, and

were excluded from admission into the United States on the ground that they were likely to become public charges; that the Secretary of Labor affirmed the order of the board; but that the order of exclusion was illegal because of the absence of any evidence sustaining or tending to sustain the administrative decision. This want of sustaining evidence is the sole ground of illegality alleged. It is not alleged that the hearing was fraudulent or unfair. Want of "jurisdiction on the part of said board of special inquiry because of the absence of any evidence sustaining or tending to sustain such finding" was alleged, but want of jurisdiction over the subject-matter was not charged. The petition did not set out the proceedings before the board of special inquiry nor give any excuse for the failure to do so.

The return to the writ set up that petitioners were restrained by reason of exclusion orders of the board of special inquiry, affirmed by the Secretary of Labor. The record of proceedings before the immigration officials was attached. From the record it appears that the petitioners were members of a group of Russian (Osetin) Kabordinians, with tickets for Portland, Oreg. Ali Gegiow had $40 (R. 9) and Sabas Zarikoew $25 (R. 12). Neither could speak English. Gegiow could speak Russian, but the only dialect Zarikoew could speak was not understood by the official interpreters (R. 8, 25). Neither had anyone in this country legally liable for

his support. The board inspected their personal appearance and demeanor and saw what manner of men they were. Gegiow was asked (R. 9):

> If you were informed that there were a great many men at present unemployed and the municipal authorities were making efforts to inaugurate public work in order to relieve their distress, would you still wish to go there?

He indicated that he would. Zarikoew was examined, together with several others in their group, and Gegiow was present throughout the examination. In the presence of all, the board said (R. 10):

> We have information that there is a large number of people out of employment there [*i. e.*, in Portland], and knowing this, do you still desire to go there?

This was repeated twice (R. 11, 16). The aliens were informed that the board was about to deny them admission and they were asked if they had anything further to say why they should be permitted to proceed (R. 16). They replied in the negative. At no time did they or anyone on their behalf seek to controvert the board's announced opinion as to conditions of unemployment in Portland nor to present any further evidence to the immigration authorities of their ability to earn their own living. The decision of the board follows (R. 16):

> The board is unanimous in the opinion that these aliens are persons likely to become

a public charge for the following, *among other reasons*:

They arrive here with very little money, and in view of the recent employment reports of industrial conditions at Portland and vicinity, the board believes it would be impossible for them to obtain employment at manual labor. The money in their possession is insufficient to meet their requirements until such time as they might hope to obtain employment. They have no one here legally obligated to assist them in case of need. Two of the aliens have wives and dependent families in their native country. If admitted there is a likelihood of their becoming a public charge. Excluded and ordered deported. [Italics ours.]

To Aliens:

Under the law you are entitled to an appeal from the decision of this board denying you the right to land to the Secretary of Labor at Washington for a review by him of such decision. If deported it will be at the expense of the S. S. Co. which brought you here. Do you understand your right?

A. Yes.

The record discloses the affirmance of the excluding order by the Secretary of Labor (R. 25). Petitioners filed a traverse to the return, alleging again want of sustaining evidence. On motion of the district attorney the District Court dismissed the writ (R. 28). The court held that the finding of the board of special inquiry, affirmed by the Secretary of Labor, was final, and that it had no juris-

diction to review the evidence before the board (R. 26, 27). On appeal the order of dismissal was affirmed (R. 36). The Circuit Court of Appeals, examining the evidence, held that it sustained the finding of the board.

PERTINENT STATUTES.

Section 2 of the immigration act of February 20, 1907, 34 Stat. 898, as amended by the act of March 26, 1910, 36 Stat. 263, provides:

> SEC. 2. That the following classes of aliens shall be excluded from admission into the United States: * * * persons likely to become a public charge; * * *
>
> SEC. 24 (34 Stat. 906). * * * Immigration officers shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter the United States, and where such action may be necessary, to make a written record of such evidence; * * *
>
> SEC. 25. That such boards of special inquiry shall be appointed by the commissioner of immigration at the various ports of arrival as may be necessary *for the prompt determination of all cases of immigrants detained at such ports under the provisions of law.* Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner General of Immigration, with the approval of the Secretary of Commerce and Labor, shall from time to time designate as qualified to serve on such boards:

Provided, That at ports where there are fewer than three immigrant inspectors, the Secretary of Commerce and Labor, upon the recommendation of the Commissioner General of Immigration, may designate other United States officials for service on such boards of special inquiry. *Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported.* All hearings before boards shall be separate and apart from the public, but the said boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decision of any two members of a board shall prevail, but either the alien or any dissenting member of the said board may appeal, through the commissioner of immigration at the port of arrival and the Commissioner General of Immigration to the Secretary of Commerce and Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the commissioner of immigration at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry: *Provided, That in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secre-*

> *tary of Commerce and Labor;* but nothing in this section shall be construed to admit of any appeal in the case of an alien rejected as provided for in section ten of this act. [Italics ours.]

Petitioners contend that the evidence of industrial conditions in Portland was not competent; that the competent evidence before the board of special inquiry and the Secretary of Labor wholly fails to sustain the decision of exclusion; that therefore their rights under the Fifth Amendment and the Immigration Law were denied. In their brief, petitioners further contend that they were not accorded a fair hearing, in that the evidence of industrial conditions was not disclosed to them and they had no opportunity to rebut it.

Respondent contends that the fact of an administrative determination adverse to the aliens is final, and is the sole evidence admissible in the courts as to the legality of petitioners' restraint; that the fact of determination can not be collaterally attacked on the ground of want of any sustaining evidence; that in this case the proceedings before the immigration authorities were in every way regular, fair, and within their jurisdiction.

THE ISSUES.

The principal question was placed before the Circuit Court of Appeals on the petition for rehearing in this language (petitioners' brief, p. 6):

> (1) Where an alien is excluded by a board of special inquiry as being a member of the

classes excluded by the Immigration Act, and the excluding decision was affirmed by the Secretary of Labor, if a fair, though summary, hearing was not denied to the alien, is the action of the immigration authorities reviewable by the United States District Court in habeas corpus proceedings to determine whether there was *any* evidence to justify the finding of the executive authorities?

Further questions are raised as to the validity of petitioners' complaint that in this case they were not accorded the kind of proceeding provided by the statute in that (1) hearsay evidence as to industrial conditions at petitioners' destination was considered by the board, (2) petitioners were not informed thereof nor did they have an opportunity to rebut it, (3) nor did they have opportunity to cross-examine the witnesses against them.

ARGUMENT.

I.

Congress has power to make the fact of a favorable administrative decision the condition of entry of aliens, withholding from the courts jurisdiction to review the evidence on which the decision is based.

1. Congress has complete power to exclude all aliens and to determine the conditions of their entry.

Whether the power of Congress to exclude aliens from admission into the United States is an incident to sovereignty or is rested on the control over commerce with foreign nations, it is exclusive and

plenary. Incident to the power to exclude all is the power to determine the conditions upon which any may enter. Congress may exclude all of a certain race or all except the million first to apply in any one year. It may determine the million entitled to enter by lot cast by one of its committees. Conversely, the alien has no right to admission under the Constitution. His rights must be determined entirely by reference to the congressional enactments. This is settled law.

In *Lapina* v. *Williams*, 232 U. S. 78, 88, the court said:

> The authority of Congress over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country.

In *United States* v. *Ju Toy*, 198 U. S. 253, 261, quoting from the *Japanese Immigrant Case*, 189 U. S. 86, 97, it was said:

> That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of the law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court.

See also *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Turner* v. *Williams*, 194 U. S. 279, 290.

2. The administrative determination made the condition of entry need not be based upon a hearing at which the alien has an opportunity to present evidence.

In the fulness of its power, Congress may make the condition of entry certain facts as to the alien's characteristics. Without more, evidence as to the existence of these facts might be subject to review by the courts. But Congress may go further, as it has done, and prescribe as the sole and indispensable condition the fact of a favorable administrative decision; and in so doing provide mere inspection of the alien without any "hearing" at all. This also is settled by the cases.

In *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, there was upheld as constitutional that section of the immigration act of 1903 which provided for the imposition of a penalty of $100 on steamship companies which brought certain diseased aliens to our shores, on the sole basis of the certificate of the United States medical officer. The court, reaffirming the broad powers of Congress over the admission of aliens, unanimously held that the condition to entry of the alien was the fact of the certificate of the medical officers, and that the steamship company had no right to a hearing in which they could present evidence either

before the medical officers or before the courts. Mr. Justice White, speaking for the court, said (p. 340):

> It is urged that the fines which constituted the exactions were repugnant to the Fifth Amendment, because amounting to a taking of property without due process of law, since, as asserted, the fines were imposed, in some cases, without any previous notice, and in all cases without any adequate notice or opportunity to defend. * * *
>
> (p. 342.) But into that controversy we do not think it necessary to enter, since, as previously pointed out, it is evident that the *statute unambiguously excludes the conception that the steamship company was entitled to be heard, in the sense of raising an issue and tendering evidence* concerning the condition of the alien upon arrival at the point of disembarkation, as the plain purpose of the statute was to exclusively commit that subject to the medical officers for which the statute provided. We shall, therefore, test the soundness of the proposition we are considering upon that assumption.
>
> In view of the absolute power of Congress over the right to bring aliens into the United States we think it may not be doubted that the act would be beyond all question constitutional if it forbade the introduction of aliens afflicted with contagious diseases, and, as a condition to the right to bring in aliens, imposed upon every vessel bringing them in, as a condition of the right to do so, a penalty

> for every alien brought to the United States afflicted with the prohibited disease, wholly without reference to when and where the disease originated. * * * *Indeed, it is not denied that there was full power in Congress to provide for the examination of the alien by medical officers and to attach conclusive effect to the result of that examination for the purposes of exclusion or deportation.* But it is said the power to do so does not include the right to make the medical examination conclusive for the purpose of imposing a penalty upon the vessel for the negligent bringing in of an alien. We think the argument rests upon a distinction without a difference. [Italics ours.]

This case, the purport of which is entirely ignored in petitioners' brief, is conclusive of the case at bar.

In *Tiaco* v. *Forbes*, 228 U. S. 549, it was held that the Philippine Legislature had power to ratify by statute the forcible expulsion and exclusion apparently without hearing of certain Chinese. The court said (p. 557):

> Furthermore, the very ground of the power in the necessities of public welfare shows that it may have to be exercised in a summary way through executive officers * * *.
>
> As Congress is not prevented by the Constitution, the Philippine Government can not be prevented by the Philippine Bill of Rights alone. Act of July 1, 1902, c. 1369, §5,

DARK PAGE BLEED THRU

> 32 Stat. 691, 692. Deporting the plaintiffs was not depriving them of liberty without due process of law, unless on other grounds the local government was acting beyond its powers.

So in *Buttfield* v. *Stranahan,* 192 U. S. 470, the tea-inspection act was held constitutional which provided for the exclusion of teas sought to be imported which the tea examiners found not to conform to the standards of purity, quality, and fitness for consumption designated by the Secretary of the Treasury. The action was to recover for the alleged wrongful destruction of teas rejected. It was held that the importers were not entitled to a hearing either before the tea inspectors or before the courts as to the quality of their teas. Mr. Justice White, speaking for the court, said (p. 497):

> It is urged that there was denial of due process of law in failing to accord plaintiff in error a hearing before the Board of Tea Inspectors and the Secretary of the Treasury in establishing the standard in question, and before the general appraisers upon the reexamination of the tea. Waiving the point that the plaintiff in error does not appear to have asked for a hearing, and assuming that the statute did not confer such a right, we are of opinion that the statute was not objectionable for that reason. The provisions in respect to the fixing of standards and the examination of samples by govern-

> ment experts was for the purpose of *determining whether the conditions existed which conferred the right to import, and they therefore in no just sense concerned a taking of property.* This latter question was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of the agents of the government, upon whom power on the subject was conferred. [Italics ours.]

In *Auffmordt* v. *Hedden,* 137 U. S. 310, it was held that a statute committing the valuation of imports exclusively to administrative officials was valid, as against the objection that the importer was excluded from the proceedings, that he had no opportunity to confront opposing witnesses, nor opportunity to sift the evidence against him and rebut it, and no lawyers to represent him. The same ruling was made in *Origet* v. *Hedden,* 155 U. S. 228. It was recognized in *Origet* v. *Hedden* that the summary determination of valuation might be imposed as the condition attending the importation (p. 238). See in accord *United States* v. *Sherman,* 237 U. S. 146, 153, 155.

2. When Congress has made a favorable administrative decision the sole and indispensable condition precedent to entry, and has declared an adverse decision to be final, the courts have no power to review the evidence upon which the latter is based.

That in the exercise of constitutional power Congress may prescribe as the sole condition of entry the fact of a favorable administrative decision, thus

precluding the judiciary from any examination into the sufficiency or even existence of facts on which the decision is based, was settled in the leading case of *Nishimura Ekiu* v. *United States*, 142 U. S. 651. There, in dealing with the immigration act of 1891, making final the determination of the immigration officials adverse to the alien, the court said (p. 660):

> And Congress may, if it sees fit, as in the statutes in question in *United States* v. *Jung Ah Lung*, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, *he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.* (Cases cited). It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of

> executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. [Italics ours.]

The condition precedent to entry is a favorable administrative decision. If this decision were refused under a statute, such as Congress would undoubtedly have power to pass, which dispensed with any hearing or evidence, it would of course result that the courts could not inquire into the facts on which the decision was based. The situation is no different under the present statute providing for a hearing and the presentation of evidence, but declaring that an adverse administrative decision shall be final. In the face of such a statute the courts have no jurisdiction to entertain the alien, for the fundamental reason that he has never acquired any right which he can call upon them to protect. He has no constitutional right to enter the United States. A resident or person domiciled in the United States who complains that his personal or property rights are being infringed by legislative act, may be heard in the courts, regardless of congressional enactment to the contrary. But for the determination of the alien's rights to admission, he can go no further in or out of the courts than Congress has permitted.

If the " due process " clause were applicable to the situation, to bar an alien applicant on the sole ground of an adverse administrative determination without intervention of the courts would nevertheless be due process of law. Due process is such a

proceeding as is appropriate in the nature of the case. *Davidson* v. *New Orleans,* 96 U. S. 97, 105. As was said in *Ju Toy's* case, 198 U. S. 253, 263:

> It is unnecessary to repeat the often quoted remarks of Mr. Justice Curtis, speaking for the whole court in *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272, 280, to show that the requirement of a judicial trial does not prevail in every case.

Accordingly, it is held that the courts do not deny due process of law in refusing to review the decision of the Secretary of the Interior as to who is an Indian within the terms of a land grant (*West* v. *Hitchcock,* 205 U. S. 80); or the decision of the land office as to whether the facts exist upon which a land patent should be issued (*Smelting Co.* v. *Kemp,* 104 U. S. 636).

The necessity and appropriateness of a summary proceeding in order quickly and finally to determine the applicant's rights to admission would be sufficient in the instant case to sustain the proceeding as due process of law. The danger to the community from the introduction of tubercular aliens, anarchists, aliens afflicted with trachoma, smallpox, and others, is well known. If a considerable delay incident to litigation is necessary in order to pass upon the rights of such aliens to enter, the effort to protect the community is nullified. *Oceanic Navigation Company* case, *supra.* Again, the number of immigrants for years prior to the act of 1907 was, in

1905, 1,026,499; in 1906, 1,100,735; in 1907, 1,285,349. Sen. Doc. No. 756, 61st Cong., 3d sess., v. 3, Report of Immigration Commission, p. 4. In 1907, 13,064 were debarred, and in 1910, 24,270. *Id.*, p. 367. Many thousands must often be examined each day. The harbors must not be congested with arriving vessels awaiting passengers' examination. The quarters at Ellis Island for detained immigrants are not unlimited. If dissatisfied aliens, anxious to spend in this country even the time consumed in the ordinary course of a judicial trial, were permitted to seek the aid of the courts in each case, presumably assisted by the steamship companies, on whom the duty rests to return improper applicants, an immigration act would be impossible of enforcement. Certainly the summary character of the proceeding would be destroyed. So even in the case of a petitioner alleging that he is a citizen with a constitutional right not to be banished, the courts have been constrained not to interfere. *Ju Toy's* case, 198 U. S. 253. See *Chin Yow's* case, 208 U. S. 8, 12.

But the applicant alien is not in the attitude of a citizen or resident complaining of a violation of his constitutional rights. His detention or temporary confinement is in no true sense a deprivation of liberty. *Wong Wing* v. *United States,* 163 U. S. 228, 235. Nor does he complain, as in the case just cited, of any sentence to infamous punishment or confiscation of goods without judicial finding of

guilt. He simply stands at the gate and knocks. His prayer is only that the court pass upon his right to enter. This it cannot do without usurping a function which Congress has committed exclusively to others. As Judge Lacombe said in the District Court (R. 27):

> The act in no uncertain language provides that, when its procedure has been conformed to, his decision as to the fact shall be final and conclusive. To construe that language so as to destroy such finality would seem to be legislation rather than construction.

The appeal to the courts has often been emphasized, as it has been in this case, by calling attention to the possibilities of abuse of power by the immigration officials. See petitioners' brief, pp. 9, 62, *et seq.* The suggestion has been dealt with many times and is conclusively disposed of by Mr. Justice White in the *Oceanic Navigation Co.* case, 214 U. S. 320, 339, 340:

> But over no conceivable subject is the legislative power of Congress more complete than it is over that with which the act we are now considering deals. * * * As the authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject, it must follow that if Congress has deemed it necessary to impose particular restrictions on the coming in of aliens, and to sanction such prohibitions by penalties enforcible by administrative authority, it follows that the constitu-

tional right of Congress to enact such legislation is the sole measure by which its validity is to be determined by the courts. The suggestion that if this view be applied grave abuses may arise from the mistaken or wrongful exertion by the legislative department of its authority but intimates that if the legislative power be permitted its full sway within its constitutional sphere, harm and wrong will follow, and therefore it behooves the judiciary to apply a corrective by exceeding its own authority. But as was pointed out in *Cary* v. *Curtis*, 3 How. 236, and has been often since emphasized by this court (*McCray* v. *United States*, 195 U. S. 27), the proposition but mistakenly assumes that the courts can alone be safely intrusted with power, and that hence it is their duty to unlawfully exercise prerogatives which they have no right to exert, upon the assumption that wrong must be done to prevent wrong being accomplished.

II.

In the Immigration Act Congress has made the fact of the decision by immigration officials the sole condition of entry. The fact of the decision being established, any inquiry into the evidence is improper.

1. The act in unmistakable terms declares that the adverse administrative decision "shall be final."

The plenary power of Congress being conceded, it is in order to consider what has been done under it.

Section 19 of the act of 1907 provides (34 Stat. 898, 904):

> That all aliens brought to this country in violation of law shall, if practicable, be immediately sent back to the country whence they respectively came on the vessels bringing them in.

Section 25 establishes the boards of special inquiry "for the prompt determination of all cases of immigrants detained," and further provides:

> Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. * * * In every case where an alien is excluded from admission * * * the *decision* of the appropriate immigration officers, if adverse to the admission of such alien, *shall be final* unless reversed on appeal to the Secretary of Commerce and Labor. [Italics ours.]

That Congress recognized the necessity for summary proceedings appears in every line of the immigration act. In the case of applicants afflicted with contagious and loathsome diseases not even an appeal to the Secretary of Labor is permitted. The menace or trouble to the community from other classes excluded, such as idiots, prostitutes, persons likely to become a public charge, anarchists, etc., was to be suffered until the Secretary of Labor could hear the appeal, but his decision is made *final*, and excluded persons are to " be immediately sent back * * * on the vessels bringing them."

Finality of the Secretary's decision is "for the avoidance of controversy and delay." *Oceanic Navigation Co.* v. *Stranahan, supra,* p. 337.

In *Pearson* v. *Williams,* 202 U. S. 281, the court said in treating of the immigration act, pp. 284–286:

> * * * The board is an instrument of the executive power, not a court. * * * The decisions necessarily are made, as we have said, in a summary way, in order to reach the "prompt determination" declared by §25 to be an object. The board has no power to compel witnesses to attend, but, as was said by the Circuit Court of Appeals, must decide upon such evidence as is at hand or is readily accessible. * * * It is true that the decision hardly will be questioned in the courts except when it is against the right to land. In the earlier acts the decision of an inspector was made final, in terms, only "when adverse to such right." Act of March 3, 1891, c. 551, §8, 26 State, 1085. * * * There can be no doubt, we think, that the provision of the act of 1891 referred to the courts. The adverse decision of an inspector would be followed by deportation unless that should be stopped by *habeas corpus.* To prevent a retrial in that event the provision was passed.

In *Lem Moon Sing* v. *United States,* 158 U. S. 538, where under the Chinese exclusion act declaring the adverse order of the immigration officials final it was held that the evidence of the existence of

facts on which the officer based his decision could not be reviewed on *habeas corpus*, the court said:

> (pp. 548–550.) It is supposed that the claim of the appellant is sustained by *Lau Ow Bew* v. *United States*, 144 U. S. 47. But that is a mistake. * * * Now the difference between that case and the present one is that, by the statutes in force when the former was decided, the action of executive officers charged with the duty of enforcing the Chinese Exclusion Act of 1882, as amended in 1884, could be reached and controlled by the courts when necessary for the protection of rights given or secured by some statute or treaty relating to Chinese. But, by the act of 1894, the decision of the appropriate immigration or customs officers excluding an alien "from admission into the United States under any law or treaty," is made final in every case, unless, on appeal to the Secretary of the Treasury, it be reversed. * * *
>
> The remedy of the appellant was by appeal to the Secretary of the Treasury from the decision of his subordinate, and not to the courts. If the act of 1894 had done nothing more than appropriate money to enforce the Chinese Exclusion Act, the courts would have been authorized to protect any right the appellant had to enter the country, if he was of the class entitled to admission under existing laws or treaties, and was improperly excluded. But when Congress went further and declared that in every case

> of an alien excluded by the decision of the appropriate immigration or customs officers "from admission into the United States under any law or treaty," such decision should be final, unless reversed by the Secretary of the Treasury, *the authority of the courts to review the decision of the executive officers was taken away.* * * *
>
> To avoid misapprehension, it is proper to say that the court does not now express any opinion upon the question whether, under the facts stated in the application for the writ of *habeas corpus,* Lem Moon Sing was entitled, of right, under some law or treaty, to reenter the United States. We mean only to decide that that question has been constitutionally committed by Congress to named officers of the executive department of the government for final determination. [Italics ours.]

To be sure, the decision, in order to be the kind which the statute constitutes the condition of exclusion, must be an honest one made in good faith. As was said in *Chin Yow* v. *United States,* 208 U. S. 8, where rights of citizenship were passed upon:

> (p. 12.) The decision of the department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. * * *
>
> (p. 13.) But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add,

the denial of a hearing cannot be established by proving that the decision was wrong.

In the case at bar the petition for *habeas corpus* does not attack the decision on the ground of fraud or unfairness. It is not charged in the petition or the brief that the proceedings before the board and the Secretary of Labor were not in good faith, or that the aliens did not know the nature of the proceeding, or that they requested and were denied opportunity to present their claims, or that the decisions of the board and the Secretary did not represent their honest opinions of the facts. In the petition for rehearing before the Circuit Court of Appeals counsel framed the questions, predicated on a *fair* hearing, as follows (petitioners' brief, p. 6):

> If a *fair,* though summary, hearing was not denied to the alien, is the action of the immigration authorities reviewable by the United States District Court in *habeas corpus* proceedings to determine whether there was any evidence to justify the finding of the executive authorities?

We deal with the question here precisely as thus presented.

2. The statute imports that want of any sustaining evidence shall not of itself constitute a ground for judicial impeachment of the adverse administrative decision.

The petition for *habeas corpus* does allege that the decision was without jurisdiction on the part of the board and the Secretary of Labor "because of

the absence of any evidence sustaining or tending to sustain " the decision (R. 3). But this is the sole ground of want of jurisdiction alleged.

(a) The officers do not lose exclusive jurisdiction by judging all the evidence erroneously.

The essential nature of petitioners' request is not altered by calling the error an error of law or an error of jurisdiction. Petitioners still seek to have the court review the evidence. The effort is still to have the court suspend the enforcement of the immigration act by inquiry into matters which the legislature has declared to be nonjudicable. At what point does the evidence before the board cease to be adequate to sustain and become wholly insufficient to sustain? The power of the board to decide involves the power to pass on the sufficiency and the existence of evidence before them. *Lee Lung* v. *Patterson,* 186 U. S. 168, 176. Duly appointed officers do not lose jurisdiction by deciding wrongly. *Chin Yow* v. *United States, supra,* p. 13. Courts do not acquire jurisdiction because the judgment of the officers though honest was erroneous.

Petitioners' contention in this form is not new. In denying its validity in the *Lem Moon Sing* case, *supra,* the court pointed out that to give it effect would amount to a virtual repeal of the statutory provision declaring the administrative decision final (158 U. S. 546, 547).

In *Harlan* v. *McGourin,* 218 U. S. 442, petitioner in *habeas corpus* urged as a ground of illegal re-

straint that the verdict and judgment of conviction in the criminal case were wholly unsupported by the testimony. Dismissal of the writ involved the holding that a tribunal does not lose jurisdiction by rendering a decision without any evidence to support it, nor does the court thereby acquire jurisdiction to correct it.

The court denied relief on the customary grounds and said (p. 444):

> The cases have been earnestly and elaborately argued here by counsel for appellants, upon the theory that in a proceeding of this character the court may inquire into the facts put in evidence at the trial, at least so far as is necessary to determine whether there was any inculpating testimony, * * *.
>
> It is contended that an examination of the bill of exceptions will disclose that the alleged conspiracy was not formed in the Northern District of Florida as laid in the indictment; *that there is a total lack of evidence to connect the petitioners with any such conspiracy;* that the petitioners (notably the petitioner Harlan) are not shown by any competent testimony to have been concerned in any overt act for the carrying out of the alleged conspiracy; * * * (p. 445).
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> * * * * * *
>
> (p. 448.) If such would be its effect then this court could readily be converted into an appellate court in criminal proceedings, a jurisdiction denied to it by the statute. No

attack can be successfully made upon the right and authority of the Circuit Court of the United States to take jurisdiction of the offense charged in the indictment. No objection is made to the constitutionality of the statute or the right and authority of the court to consider and determine the guilt or innocence of the accused, and for that purpose to weigh and determine the effect of the testimony offered. *The contention is that in the respects pointed out the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused.* This has never been held to be within the province of a writ of *habeas corpus.* Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions. [Italics ours.]

The ruling was followed in *Matter of Gregory,* 219 U. S. 210, 213, where the court said (p. 213):

> The only question before us is whether the Police Court had jurisdiction. A *habeas corpus* proceeding cannot be made to perform the function of a writ of error and we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constituted a crime, that is to say whether the court properly applied the law, if it be found that the court had jurisdiction to try the

> issues and to render the judgment. (Citing cases.) This rule has recently been applied in a case where it was contended in a *habeas corpus* proceeding that the record should be examined to determine whether there was any testimony to support the accusation. And this court, affirming the judgment which discharged the writ, said by Mr. Justice Day: "The contention is that in the respects pointed out the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused."

See also in accord *Glasgow* v. *Moyer*, 225 U. S. 420, 428, 429.

(b) Want of any sustaining evidence in the record does not per se establish fraud or lack of good faith.

There can be no rule of law to the contrary. The board and the Secretary may be woefully mistaken, but they need not be in consequence dishonest or unfair. Opinions may differ greatly as to the capacity of individuals to do without public support. Previous difficulties in earning a livelihood, knowledge of the persons who fill our public institutions for the unfortunate, might induce widely different conclusions by different people as to the likelihood of any particular aliens to become a public charge.

The Circuit Court of Appeals, moreover, was of opinion that the evidence was quite adequate to

sustain the finding (R. 33). See also *White* v. *Gregory*, 213 Fed. 768. This would seem to be amply sufficient to disprove any contention as to the board's want of good faith, even if such contention were made by petitioners.

These considerations are emphasized when we reflect that the statute does not require, either expressly or impliedly, that all moving facts and reasons for the decision of the board of special inquiry should be reduced to writing and preserved in the record. The language is that—

> All hearings before boards shall be separate and apart from the public, but the said boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them.

The act of 1891, section 8, provided in somewhat similar language that—

> The inspection officers and their assistants shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record.

This was held not to make the entry and taking of testimony indispensable, but to require only that such testimony as was taken should be entered of record. Said this court in the *Nishimura Ekiu* case, 142 U. S. 651, 663:

> It was also argued that Hatch's proceedings did not conform to section 8 of the act

of 1891, because it did not appear that he took testimony on oath, and because there was no record of any testimony or of his decision. But the statute does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land. The provision relied on merely empowers inspectors to administer oaths and to take and consider testimony, and requires only testimony so taken to be entered of record.

Nor does the provision in section 25 that the decision of the Secretary of Labor on appeal "shall be rendered solely upon the evidence adduced before the board of special inquiry" impose any obligation upon the board in addition to those previously set forth. The clause is solely a limitation upon the power of the Secretary of Labor forbidding him to reopen the case and to receive new and additional testimony which the board had not considered, a provision manifestly inserted in pursuit of the legislative plan for a summary and speedy disposition of the matter.

It is inconceivable that Congress should have intended to prohibit the immigration officers, whether acting alone in the first instance or as members of a board of special inquiry, from receiving the evidence furnished by their own eyes and senses as to the excludable status of the alien. Contrary to the contention advanced in the brief for petitioners,

a medical certificate does not exhaust by any means all the cases in which the direct evidence furnished by personal inspection may be available. For instance, under section 2 " all children under sixteen years of age, unaccompanied by one or both of their parents, at the discretion of the Secretary of Commerce and Labor, or under such regulations as he may from time to time prescribe," are excluded. Surely in the case of a child, obviously under the age limit, the immigration officials may act upon the evidence of their senses without resorting to the taking of any testimony.

It must be remembered that officials constantly engaged in this work and handling hundreds of such cases day by day become expert in the decision of the questions which arise. As Mr. Justice Holmes said in *Chicago Ry. Co.* v. *Babcock,* 204 U. S. 585, 598, wherein a decision of the State Board of Assessors on the valuation of property was upheld:

> But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth. The board was created for the purpose of using its judgment and its knowledge.

8. That under this act the courts have no jurisdiction to review the evidence is established by the decisions.

In the leading case of *Nishimura Ekiu* v. *United States, supra,* the court said (p. 660):

> But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, *he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.* [Italics ours.]

This case, however, petitioners (brief, p. 31) seek to distinguish, on the ground that the immigration act has been amended. They contend that the present act provides for a board of special inquiry instead of a single immigration official; and requires the board to hold a hearing at which all the evidence on which the board acts must be presented and preserved in the record, in order that the Secretary of Labor, to whom an appeal may be taken, may be able to decide on this evidence. As bearing on this it is said that, whereas under the act of 1891 the immigration officers might act upon inspection and need take no testimony, the provision in the present act for a medical inspection, made final, takes care of all cases in which decision based on inspec-

tion may be made. It is submitted in reply that the immigration officers may still take into account the results of personal inspection and need not transcribe all the details leading to their conclusion. But in any event the provision as to finality remains the same. An appeal was provided to a Cabinet officer in the act of 1891, as in the act of 1907. Whether or not the course of procedure has been changed, the finality of the ultimate decision of the appropriate immigration officers can not be assailed on the ground that the evidence on which the officers acted is in the opinion of the court not adequate to sustain their order. The *Nishimura* case, holding expressly that the court is not "at liberty to reexamine or controvert the sufficiency of the evidence on which he acted," is not based at all on the further incidental holding that under the act of 1891 the inspectors are allowed to decide upon their own inspection (p. 663), but upon the broader proposition that Congress had expressly made the administrative determination the condition of the alien's right to entry, and it was not within the province of the court to render that determination less than final. There was apparently less evidence before the officer in the *Nishimura* case that the alien was likely to become a charge than there was before the board of inquiry here.

In *White v. Gregory,* 213 Fed. 768, a case parallel to the one at bar, alien applicants were rejected as likely to become public charges according to the

record of the board for the following reason (p. 769):

> First, because they are common farm laborers, and there is not work for them in the United States; second, because they have but a limited amount of money, insufficient to maintain them during the winter; third, because there are 800 to 1,000 Russians unemployed in Seattle and thousands of other nationalities in the same condition, and reports from the interior are to the effect that the supply of common labor is far in excess of the demand; and fourth, that any addition to the unemployed should be guarded against and alien laborers should not be permitted to enter the United States at this time.

In dismissing the writ of *habeas corpus* the Circuit Court of Appeals, relying on the *Nishimura* case, said (pp. 770, 771):

> The finality of the decision of the political department of the Government respecting the right of an alien to be admitted into the United States, as provided in the act of 1907, is identical with that of the act of 1891, and Congress must be held to have adopted the provision with full knowledge of the construction placed upon it by the judicial department of the Government. Furthermore, the substitution in the later act of a board of special inquiry, composed of three officers, at the port of arrival, for the inquiry of a single officer, that of the Superin-

tendent of Immigration, provided in the earlier act, with an appeal to the Commissioner of Immigration at the port of arrival, and from the Commissioner of Immigration to the Secretary of Labor, in place of review by the Secretary of the Treasury, indicates the purpose of Congress to give to the alien every opportunity to present to the political department of the Government his claim of right to be admitted into the United States, and to that department full authority to finally and conclusively determine such right.

In the present case the executive officers found that the aliens were persons likely to become a public charge. This is a ground of exclusion provided by law. In reaching this conclusion the officers gave the aliens the hearing provided by the statute. This is as far as the court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts or consider the reasons for the conclusion reached by the officers. As said by the Supreme Court:

"Unless and until it is proved to the satisfaction of the judge that a hearing, properly so called, was denied, the merits of the case are not open, and, we may add, the denial of a hearing can not be established by proving that the decision was wrong." *Chin Yow* v. *United States,* 208 U. S. 8, 13; 28 Sup. Ct. 201 (52 L. Ed. 369).

The opinion in the *Gregory* case in the District Court (210 Fed. 680) is much relied on by peti-

tioners. See their brief (p. 71). The District Court, which was reversed, had said:

> The laws and principles upon which our Government rests forbids the exercise of arbitrary power. Immigration officers must act within the powers given. Courts have power to intervene where they exceed their authority.

In *Lee Lung* v. *Patterson, supra,* a Chinese exclusion case, the court said (pp. 175–6):

> It was decided in *Nishimura Ekiu's* case that Congress might entrust to an executive officer the final determination of the facts upon which an alien's right to land in the United States was made to depend, " and that if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency." This doctrine was affirmed in *Lem Moon Sing* v. *United States,* 158 U. S. 538, and at the present term in *Fok Yung Yo* v. *United States,* 185 U. S. 296, and *Lee Gon Yung* v. *United States,* 185 U. S. 306.
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> * * * * *
>
> It is urged that the statute makes the certificates evidence, and that the collector had no power to disregard the certificates, and " whether he did not consider them at all and did not pass upon their validity or invalidity, as in either view of the case, we respectfully submit the collector is not chargeable merely

with error, in which event his decision is not reviewable by the court, but with the more serious charge of having exceeded his jurisdiction, in which case, we submit, his decision is reviewable."

But jurisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and *we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper.* [Italics ours.]

The contention passed upon in the *Lee Lung* case, that the collector had no jurisdiction to disregard the sole evidence permissible on the part of the person endeavoring to establish a right of entry, *i. e.*, the certificate, differs in no material respect from the contention in this case that the evidence before the board was utterly inadequate.

See also *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Fok Yung Yo* v. *United States*, 185 U. S. 296; *Lee Gon Yung* v. *United States*, 185 U. S. 306.

These cases go the full length. The question is one of jurisdiction and collateral attack. The cases cited establish the want of jurisdiction on the part of the courts to enter at all into an examination of

the evidence before the immigration officers in exclusion cases where there is no ground of attack upon the decision other than a want of sustaining evidence.

d. Cases under statutes providing for administrative proceedings of a different kind are not applicable.

Petitioners cite certain cases in which the courts have examined the evidence on which administrative findings were based. Among these is *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, in which the Postmaster General was enjoined from issuing a fraud order based on a finding of fraud where there was no evidence at all to sustain it. The statute there, however, does not make the finding of the Postmaster General final. R. S., sec. 3929, provides:

> The Postmaster General may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent lottery, etc.—

issue a fraud order. The fraud order in the *McAnnulty* case violated the property rights of complainant to complainant's irreparable injury. These property rights were to be determined by reference both to the Constitution and to the statute, not simply to the statute alone. The necessities of efficient government did not require a summary proceeding, and the statute itself gave no hint that one was intended. The statute fairly con-

strued does not authorize a fraud order on the basis of the finding by the Postmaster General, but only where on the actual facts a reasonable postmaster might not unreasonably find that a person was engaged in conducting a fraudulent lottery, etc. The person whose property rights are violated by an order not authorized by the statute may therefore seek relief in the courts. But even here the presumption of validity favors the finding of the Postmaster General, and the courts are loath to interfere. *Coyne Publishing Co.* v. *Paine,* 194 U. S. 497.

Petitioner also relies (brief, p. 37) on certain deportation cases arising under the sections of the immigration law dealing with deportation after an alien has entered and become a resident of the United States. It is true that in *Zakonaite* v. *Wolf,* 226 U. S. 272, and in *Lewis* v. *Frick,* 233 U. S. 291, the court said in denying writs of *habeas corpus* that the evidence before the immigration officials sustained their action. But a less sweeping declaration that the petitioner had been accorded the fair hearing to which he was entitled under the statute would have sustained the decision in either case. Moreover, the statutory provisions under which deportation proceedings are held are entirely different. They do not make the finding the final fact as the condition of deportation. Section 21 of the immigration act of 1907, 34 Stat. 905, provides:

> That in case the Secretary of Commerce and Labor shall be satisfied that an alien

has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, etc.

There is no necessity for prompt and summary disposition of deportation proceedings. Under section 21 they may be held at any time within three years. A resident in the United States, even though an alien, has property and personal rights on which a hearing before the courts is guaranteed by the Constitution and to which an alien applicant is not entitled. By declaring the deportation order final, Congress might have made the entrance of aliens conditional upon their waiver of a hearing before the courts on property and personal rights during the three-year period. But it has not done so. Thus section 21 may be taken to imply that an alien is to be deported after a fuller hearing than is accorded by section 25, and only upon facts from which a reasonable Secretary of Labor might not unreasonably find that he was subject to deportation. These considerations are applicable also with reference to the *Japanese Immigrant Case,* 189 U. S. 86; *Turner* v. *Williams,* 194 U. S. 279; *Low Wah Suey* v. *Backus,* 225 U. S. 460; as well as in the *Zakonaite* and *Lewis* cases, *supra.* All of these were deportation, not exclusion cases.

The distinction between the hearing to be accorded to a citizen or to a resident entitled to constitutional protection, and that to be accorded to an alien applicant for admission has been recognized. In the *Japanese Immigrant Case*, 189 U. S. 86, the court said (pp. 100, 101):

> Now, it has been settled that the power to exclude or expel aliens belonged to the political department of the Government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was "due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency." (Citing cases.) But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt,

> vigorous action contemplated by Congress, *and at the same time be appropriate to the nature of the case upon which such officers are required to act.* Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, *who has entered the country, and has become subject in all respects to its jurisdiction,* and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized. [Italics ours.]

In *Lem Moon Sing* v. *United States, supra,* the court said (p. 547):

> The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications. * * * He is none the less an alien because of his having a commercial domicil in this country. While he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all

> persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country, and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he can not reenter the United States in violation of the will of the Government as expressed in enactments of the law-making power.

Petitioner also relies on *Interstate Com. Comm.* v. *Louisville & Nashville R. R.*, 227 U. S. 88. But here again the kind of hearing prescribed by the Interstate Commerce Act is entirely different from that summary proceeding by which an alien applicant's right to admission is determined. The Interstate Commerce Act creates a *quasi* judicial body. The commission acts after formal petition presented to it, formal answer filed, and on full hearing of evidence. It has power to summon witnesses and take testimony. The evidence must be reduced to the record. There is no necessity for haste. The commission's orders may take away property from citizens whose property rights are protected by the Constitution. The appropriate form of hearing, and it must be appropriate, is far different from the summary proceeding made necessary by the conditions under which one million aliens come to this country each year. Further-

more, as the court in the *Louisville & Nashville* case pointed out (p. 92)—

> The statute, instead of making its orders conclusive against a direct attack, expressly declares that " they may be suspended or set aside by a court of competent jurisdiction." 36 Stat. 539 (15). Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right; whether the hearing was adequate and fair, or whether, for any reason, the order is contrary to law—are all matters within the scope of judicial power.

It was accordingly held that (p. 93)—

> All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.

Certainly the court in so saying had no intent to overrule such cases as *Oceanic Nav. Co.* v. *Stranahan, supra; Buttfield* v. *Stranahan, supra; Auffmordt* v. *Hedden,* and *Origet* v. *Hedden, supra; Nishimura* v. *Ekiu, supra,* or *Low Wah Suey* v. *Backus,* 225 U. S. 460, 471, all dealing with hearings and tribunals of a different character. See also *Tiaco* v. *Forbes, supra,* and *United States* v. *Sherman, supra,* decided subsequently to the *Louisville & Nashville Company* case.

III.

Petitioners' contentions that they had no opportunity to cross-examine opposing witnesses or to know the evidence against them, or to rebut opposing evidence, are not valid.

These points, asserted in various forms by petitioners in their brief, are not alleged in any way in the petition for *habeas corpus*.

The contentions are based upon the form and manner in which the board used reports as to depressed industrial conditions in Portland, Oregon, the aliens' destination, to which they insisted upon going (R. 9, 10). Their unsoundness is largely due to petitioners' unwarranted assumption that they have a right to a judicial trial.

1. The Immigration Act does not entitle the alien to confront and cross-examine witnesses.

Section 25 of the act provides (34 Stat. 907): "All hearings before boards shall be separate and apart from the public." The secret hearing thus prescribed is inconsistent with a right of cross-examination of opposing witnesses. The proceedings would soon cease to be summary, moreover, if cross-examination were permitted. Even in deportation cases the right of counsel to appear has been denied. *Low Wah Suey* v. *Backus*, 225 U. S. 460, 470.

That there is no right of cross-examination results also from the right and duty of the immigration officials to consider the evidence furnished by personal inspection of the applicant aliens.

2. The hearing provided in the act need not be such that the alien has opportunity to know adverse evidence and rebut it.

Knowledge of the evidence without opportunity to rebut it would, of course, be an empty right. Opportunity to rebut all adverse evidence is entirely inconsistent with the summary nature of the proceeding which Congress has provided. Repeating the words of Mr. Justice Holmes in *Pearson* v. *Williams,* 202 U. S. 281, 285:

> The board has no power to compel witnesses to attend, but, as was said by the Circuit Court of Appeals, must decide upon such evidence as is at hand or is readily accessible.

If the proceedings must be delayed until applicant aliens may investigate and send for evidence, the detention quarters at Ellis Island would soon be insufficient and the prompt determination of all cases before the return of the transporting vessel would become a fiction. The remarks of the court in *Origet* v. *Hedden, supra,* are pertinent:

> The finality of the appraisal is a condition attending the importation prescribed by the Government as essential to the operation of the system, and if the importer is afforded

> such notice and hearing as enables him to give his views and make his contention in respect of the value of his goods, he can not complain.

In *Low Wah Suey* v. *Backus,* 225 U. S. 460, it was held that the consideration of hearsay information by the immigration officers without giving opportunity to the alien to offset and disprove it did not necessarily invalidate the hearing (p. 471). In *Tang Tun* v. *Edsell,* 223 U. S. 673, an applicant alleging that he was a citizen was held not to be denied a fair hearing where the immigration officer in transmitting the appeal to the Secretary of Labor included the results of his *ex parte* investigations as to the arrival of ships years prior, although petitioners alleged this was without their knowledge and to their serious prejudice (p. 677). Mr. Justice Hughes observed that the inspector's statements were not shown to be false or for the purpose of misleading (p. 680).

The opinion of the Circuit Court of Appeals well disposes of this point. The court said:

> In the nature of the case these inquiries must be swift and summary. The formality of court proceedings cannot be had and is not expected where, in many cases, witnesses cannot be produced for examination and cross-examination. The members of these boards have, however, the great advantage of seeing the immigrant and determining

from personal observation and examination his fitness to enter the country. It is plain from a reading of the law that degenerates or those so constituted mentally, physically, or morally that they may be a burden upon or a menace to society, are not wanted here. * * * We do not assert that all of this evidence would be admissible in a court of law or equity; it is not necessary that it should be. No immigration act could be enforced which required all these facts to be established with the same formality and certainty which is required in the courts. The board had an opportunity to see the relators and to determine by personal observation what manner of men they were. * * * It is true that information in this form would not be permitted in a court of law, but the immigration officers cannot delay these proceedings indefinitely. They cannot summon witnesses from the Pacific States or send commissions there. If they were satisfied from information received that there was no market in Portland for such services as these relators could render, they were justified in acting upon such information, just as they would be if satisfied from reports in the press or from any reliable source that Portland had been destroyed by flood or fire or that an epidemic of cholera was raging there. Congress has placed the determination of these questions in the hands of trained officials and their conclusions upon disputed questions of

fact are final and conclusive. It is only in the very rare instance that a finding is without any proof to support it that the courts may interfere. (R. 33, 34.)

IV.

The evidence before the board supports their determination that petitioners were likely to become a public charge.

Petitioners' contention to the contrary is based largely upon their further contention that the immigration officials were unauthorized to consider the evidence of depressed industrial conditions at Portland. If this evidence was properly considered by the board it is not understood that petitioners seriously press their contention as to want of sustaining evidence.

The evidence, now assuming it to be before the board in proper form, was properly considered by the board as one of the elements of the question whether petitioners were likely to become public charges. A strong man unable to find work in the winter may become a public charge just as an emaciated weakling who can not do work offered. See *White* v. *Gregory,* 213 Fed. 768; *Healy* v. *Backus,* 221 Fed. 358. Besides, *certainty* that the applicant will become a public charge is not the condition, but only *likelihood* thereof.

Even laying aside the evidence as to "a large number of laborers out of employment in Portland at the present time" (R. 11), which seems to have

been so great that "the municipal authorities were making efforts to inaugurate public work in order to relieve their distress" (R. 9), can it be said that Kabordinian laborers, strange fellows in a strange land, unable to speak or write our language, arriving in the dead of winter, one possessing $40 and the other $25, without anyone in this country legally obligated to support them, are beyond possibility of being likely to require public support?

The evidence before the board must, of course, be colored by the personal appearance and demeanor of the applicants before them. There is less likelihood of an undersized but ambitious and intelligent fellow becoming a public charge than there is of an able-bodied but stupid and irresponsible vagrant. While their disabilities might not have been so great as to warrant a medical certificate conclusively showing their unfitness, their manner of answering questions and their general appearance might have influenced the board in thinking that they would have difficulty in securing employment from anyone; or, if work offered, that they might not be able, or willing, to do it. These things are probably "among other reasons" which influenced the board (R. 16).

Consideration of the evidence before the board as a whole amply demonstrates that the decision represents an honest judgment, based on proceedings in good faith. This, it is submitted, is all that the applicant aliens are entitled to in this case.

CONCLUSION.

The judgment affirming the order dismissing the writ of *habeas corpus* should be affirmed.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1915.

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